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Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law

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THE SUPREME COURT
2002 TERM

FOREWORD:
FASHIONING THE LEGAL CONSTITUTION:
CULTURE, COURTS, AND LAW

Robert C. Post*

“We must seek a conception of law which realism can accept as true.”¹

By any measure this last Term has proved remarkable. Confirming the endless capacity of the Court to astonish and surprise, the 2002 Term has shattered entrenched images of the Rehnquist Court. If in its early years the Rehnquist Court was commonly tasked for its excessive deference to “majoritarian” decisionmaking,² the Court in its 2002 Term sweepingly overruled Bowers v. Hardwick³ to invalidate antisodomy laws in some thirteen states.⁴ If in its more recent incarnation the Rehnquist Court has been vehemently denounced for its refusal to defer to congressional power, particularly in matters of structure and federalism,⁵ the Court in this last Term broadly upheld

* David Boies Professor of Law, Yale Law School. I am grateful for the advice and insight of magnificent colleagues and friends, among them Bruce Ackerman, Ian Ayres, Jesse Choper, Daniel Farber, Owen Fiss, Phil Frickey, Barry Friedman, Linda Greenhouse, Dawn Johnsen, Larry Kramer, Ken Kress, Richard Primus, Neil Siegel, Reva Siegel, and Mark Spindelman. I am especially grateful to Boalt Hall for its unstinting and generous support, as well as to the Yale Law School for its gracious encouragement. I also wish to thank Tucker Culbertson and Alan Schoenfeld for their indispensable assistance.

⁵ See, e.g., Louis D. Bilionis, The New Scrutiny, 51 EMORY L.J. 481, 486 (2002) (discussing the Rehnquist Court’s overzealous “endeavors in the name of federalism and limited national government”); Ruth Colker & James J. Brudney, Dissing Congress, 100 MICH. L. REV. 80, 83 (2001) (“In acting repeatedly to invalidate federal legislation, the Court is using its authority to diminish the proper role of Congress.”); Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 HARV. L. REV. 4, 13–14 (2001) (asserting that “this Court sees no need to accommodate the political branches at all”). For an illuminating account of the “two” Rehnquist Courts, see Thomas W. Merrill, The Making of the Second Rehnquist Court: A Pre-
Congress's authority under Section 5 of the Fourteenth Amendment to enact the family leave provisions of the Family and Medical Leave Act of 1993 (FMLA).6 If the Rehnquist Court has been relentlessly criticized for its right-wing agenda,7 the Court in its 2002 Term turned unexpectedly liberal, forcefully approving the authority of universities to use affirmative action to select their students.8

What are we to make of this Court? How are we to assemble these disparate but momentous decisions into a coherent account? One common theme is that the 2002 Term suggests a serenely confident Court, unflinchingly facing the most difficult and intractable questions of American constitutional law.9 This confidence has been growing in recent years. Whether we contemplate the "activism" of Justices who are intent on "reviving the structural guarantees of dual sovereignty,"10 or instead the alleged "arrogance" of Justices who are determined to

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7 See, e.g., Erwin Chemerinsky, Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill, 47 ST. LOUIS U. L.J. 659, 675 (2003) (concluding that "the Rehnquist Court has had a consistent majority of conservative Justices, and with overwhelming frequency they have ruled in a conservative direction").
8 Grutter v. Bollinger, 123 S. Ct. 2325, 2347 (2003). As reported by Neil A. Lewis, the Court's decision in Lawrence also angered conservatives:

Some social conservatives expressed white-hot fury today over the Supreme Court's 6-to-3 ruling striking down a Texas sodomy law and expanding the rights of gay men and lesbians.

"This has not been a good week for social conservatives," said Jay A. Sekulow, the legal director of the American Center for Law and Justice, a conservative legal advocacy group founded by Pat Robertson.

"Both the affirmative action and the gay rights decision reflect a political approach to the law that we deplore," Mr. Sekulow said.

Neil A. Lewis, Conservatives Furious Over Court's Direction, N.Y. TIMES, June 27, 2003, at A19. Charles Lane reported a similar reaction:

[The affirmative action and gay rights cases set the tone, and the disappointment at those rulings among conservatives was palpable — comparable, in its own way, to the disgust liberals expressed with the Court after Bush v. Gore. The Court's self-conscious effort to incorporate modern attitudes on race and sexuality into constitutional doctrine was, to the right, an unpardonable display of judicial activism.

Charles Lane, Minority Rights Were Term's Big Winner, WASH. POST, June 29, 2003, at A1.
9 On the self-confidence of the Court, see Laurence H. Tribe, Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from its Hall of Mirrors, 115 HARV. L. REV. 170, 288 (2001). Tribe notes that "[t]he Court's self-confidence in matters constitutional is matched only by its disdain for the meaningful participation of other actors in constitutional debate." Id.; see also Linda Greenhouse, In a Momentous Term, Justices Remake the Law, and the Court, N.Y. TIMES, July 1, 2003, at A1 ("It is a court that in recent years has displayed a notable institutional self-confidence, striking down federal statutes at near-record rates.").
safeguard traditional civil rights and liberties, we find a Court that may vigorously divide on how and when to exercise the authority of judicial review, but that no longer seems to question the prerogatives of that authority as such. In future years this attitude will likely come to be exemplified by Bush v. Gore, a "swaggeringly confident" decision reflecting an institution unequivocally embracing its mission to withdraw "some issues from the battleground of power politics to the forum of principle." For those who had in years past urged the Warren Court uncompromisingly to extend law’s empire, this self-assurance has produced an unexpectedly bittersweet triumph.

One possible source of the Rehnquist Court’s deep confidence is its announced view of the nature of constitutional law. When judges invalidate official state action as unconstitutional, they do not function as "a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country." Instead they exercise the authority that has been assigned them to pronounce the law of the Constitution. To the extent that a court under-

15 For an insightful account of how the contemporary Court’s confidence draws on liberal defenses of the Warren Court, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (forthcoming 2004) (manuscript at 370–74, on file with the Harvard Law School Library). Whether the Rehnquist Court is actually more self-assured than its predecessors, and whether it performs the practice of judicial review in a different way than did the Warren or Burger Courts, are fine and complicated questions, but I shall not address them here. Most analysis of the Rehnquist Court focuses on the many ways in which it has altered the substantive law of its predecessors, see, e.g., Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 VA. L. REV. 1045, 1052–56 (2001), rather than on its methodological practice. But see Larry D. Kramer, No Surprise. It’s an Activist Court., N.Y. TIMES, Dec. 12, 2000, at A33 ("[C]onservative judicial activism is the order of the day. The Warren Court was retiring compared to the present one."); Jed Handelsman Shugerman, A Six–Three Rule: Reviving Consensus and Deference on the Supreme Court, 37 GA. L. REV. 893, 893 (2003) ("Over the past eight years, the Rehnquist Court has waged an activist revolution that is unprecedented both in scope and in conflict. Before 1995, the Supreme Court struck down acts of Congress 134 times. Since 1995, the Court has struck down thirty-three more (one-quarter of the pre-1995 total)." (footnotes omitted)). Analysis of whether the Rehnquist Court in fact practices judicial review in a different way than its predecessors would no doubt have to consider various structural and sociological factors, such as the proliferation and routinization of federal law, the bureaucratization of the federal judiciary, and the Court’s high approval ratings (especially when compared to Congress). On the last factor, see Humphrey Taylor, Confidence in Leadership of Nation’s Institutions Slips a Little but Remains Relatively High, THE HARRIS POLL #9 (Feb. 7, 2001), at http://www.harrisinteractive.com/harris_poll/printerfriendly/index.asp?PID=219.
17 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
stands this law as categorically autonomous from the beliefs and values of nonjudicial actors, it will deploy its authority with the ease of exclusive prerogative. But to the extent that a court views the substance of constitutional law as in part dependent upon the outlook of nonjudicial actors, it will exercise what Felix Frankfurter once called the "awesome power" of judicial review with some attention to the understandings of those actors.

James B. Thayer, for example, saw this point very clearly. He argued early on that congressional "determinations" were "entitled to . . . respect . . . on very solid and significant grounds of policy and law," because the Constitution gives to Congress the "power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court." In essence Thayer conceptualized constitutional law as in part made up of the judgments of Congress, so that judicial review on the basis of that law "touches the region of political administration, and is qualified by the necessities and proprieties of administration." For that reason, Thayer argued, the Court should think long and hard before constructing constitutional law in ways that override the constitutional beliefs of Congress.

The Rehnquist Court has announced that it conceives constitutional law very differently than did Thayer. In an important series of recent decisions, the Rehnquist Court has refused to allow Congress to interpret the Constitution pursuant to its power to enforce constitutional provisions under Section 5 of the Fourteenth Amendment, on the ground that any such interpretation would threaten the "cardinal rule of constitutional law" that "ever since Marbury this Court has remained the ultimate expositor of the constitutional text." Whereas Thayer conceptualized congressional constitutional interpretation as fundamental and pervasive, the Rehnquist Court has repudiated it as a danger to the rule of law. This condemnation ultimately rests on the

20 For a modern commentator taking a similar position, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 207-28 (1999).
21 Thayer, supra note 19, at 152.
22 Thayer argued that because judicial review takes "a part . . . in the political conduct of government," judges "must apply methods and principles that befit their task." Id. "In such a work there can be no permanent or fitting modus vivendi between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power." Id.
premise that constitutional law is and ought to be autonomous from the beliefs and values of nonjudicial actors, a premise that could well contribute to the eerie confidence so characteristic of the Rehnquist Court.

In this Foreword I shall examine in detail three major cases from the 2002 Term — *Nevada Department of Human Resources v. Hibbs*,

*Grutter v. Bollinger,*

and *Lawrence v. Texas* — to explore the various ways in which constitutional law is and is not independent from the beliefs and values of nonjudicial actors. When I use the term "constitutional law," I shall be referring to constitutional law as it is made from the perspective of the judiciary. I shall use the term "culture" to refer to the beliefs and values of nonjudicial actors. I employ these stipulative definitions because they correspond to the way in which most judges and lawyers naturally conceptualize disputes over constitutional jurisprudence and authority, and it is my project in this Foreword to consider carefully the implications of this internal perspective.

I shall argue that constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture. Although Rehnquist Court decisions construing the scope of Section 5 power suppress this relationship, analysis of the 2002 Term will demonstrate that the Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law. It follows that to the extent that the Rehnquist Court actually draws confidence from its announced belief that constitutional law is autonomous from culture, that confidence is quite misplaced. Properly read, *Hibbs, Grutter,* and *Lawrence* each reveals a Court that defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors.

Of course culture comes in a myriad different guises. We can identify, for example, a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution. I shall call this subset constitutional culture. The boundary between culture and constitutional culture is quite indistinct, because lay persons typically do

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27 For different purposes I would use different definitions. If I were studying constitutional law from the perspective of executive or legislative decisionmakers, for example, or if I were writing a history of American constitutional law, I would most certainly include in my definition of constitutional law the beliefs, actions, and decisions of nonjudicial actors. If I were writing a history of American culture, moreover, I would most certainly include the decisions of judges in my definition of culture. What counts as law or as culture very much depends upon why one is asking the question.
not frame their beliefs in terms that admit of ready classification. They can fervently believe that the federal government ought to have plenary power, or that abortion is murder, without ever connecting these views to a conclusion about the nature of the Constitution. It is useful to retain the concept of constitutional culture, however, because the legitimacy of constitutional law depends in part upon what extra-judicial actors explicitly believe about the Constitution.

The tense but inescapable relationship between constitutional law and constitutional culture is the theme of Part I of this Foreword, which discusses *Nevada Department of Human Resources v. Hibbs,* a startling and fascinating decision upholding the constitutionality of the FMLA. Although *Hibbs* emphatically reaffirms the Court’s view that Congress may not independently interpret the Constitution when enacting legislation pursuant to its authority under Section 5 of the Fourteenth Amendment, the decision nevertheless discreetly but essentially modifies the Court’s own constitutional understandings in order to align them with constitutional culture.

*Hibbs* suggests that the Court’s claims for the autonomy of constitutional law reveal more about how the Court wants constitutional law to be regarded than about how constitutional law actually functions. Because the authority of the Constitution flows both from its status as our highest law and from its status as the repository of our “fundamental nature as a people” that “is sacred and demands our respectful acknowledgement,” constitutional law always reflects both the specific professional requirements of the legal system and our constitutional culture.

With this insight firmly in hand, Part II turns to scrutinize how the Court constructs the membrane separating constitutional law from constitutional culture. Normally the Court allows this membrane to remain quite porous, facilitating a free and continuous exchange between constitutional law and constitutional culture. Part II illustrates this process by examining decisions construing the scope of congressional power, focusing particularly on the Court’s opinion last Term in *Eldred v. Ashcroft.* The Court can stiffen the membrane dividing constitutional law from constitutional culture whenever it perceives that constitutional culture threatens constitutional values that the

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29 Id. at 1977-78.
30 Hanna Fenichel Pitkin, The Idea of a Constitution, 37 J. LEGAL EDUC. 167, 169 (1987). Pitkin writes that although our Constitution is something that we can make, “how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history.” Id. “Thus,” she concludes, “there is a sense . . . in which our constitution is sacred and demands our respectful acknowledgement. If we mistake who we are, our efforts at constitutive action will fail.” Id.
Court wishes to protect. This occurs typically, but not exclusively, in the context of constitutional rights.

Even when safeguarding precious constitutional rights, however, constitutional law will nevertheless both reflect and regulate constitutional culture, because rights protect constitutional values that are themselves rooted in constitutional culture. I develop this point in the context of a detailed consideration of Grutter v. Bollinger, a case that applies "strict scrutiny" to affirmative action programs for student admissions at the University of Michigan. Although Grutter regulates affirmative action to implement the legal requirements of the Constitution, the opinion plainly derives its understanding of these requirements in part from the constitutional beliefs and values of nonjudicial actors.

Part III widens the scope of analysis to consider the relationship between constitutional law and culture. It argues that constitutional law could not plausibly proceed without incorporating the values and beliefs of nonjudicial actors. A necessary consequence is that constitutional law will be as dynamic and as contested as the cultural values and beliefs that inevitably form part of the substance of constitutional law. Unless the Court were to cease protecting constitutional values altogether, it cannot avoid entanglement in the "culture wars" that sometimes sweep the country. I discuss the resulting challenges to the legal authority of the Court in the context of the recent history of substantive due process doctrine, which was radically revised last Term in Lawrence.

The Court in Lawrence intervened in an intense national debate about the regulation of sexual orientation by dramatically overruling Bowers. Because Lawrence embroiled the Court in "the passions of the day" by adopting the views of one side to this debate, the opinion is vulnerable to the charge that it is merely an improper effort by the Court to impose its cultural beliefs on the nation. The Court’s vulnerability is compounded by the genuine uncertainty expressed by Lawrence about the exact nature of the constitutional values the Court wishes to protect. Lawrence thus poses the question of how constitutional law can distinguish itself from culture and assume a distinctively legal authority.

33 Id. at 2337–39.
34 But see Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").
36 "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in the judgment).
If Part II emphasizes the many ways in which constitutional law depends upon constitutional culture for its orientation and substance, the discussion of Lawrence in Part III focuses on the opposite phase of the dialectical relationship between constitutional law and culture. It explores the dynamic processes by which constitutional law comes into being as an institutional force capable of regulating culture. It argues that Lawrence is best interpreted as an opening bid in a conversation between the Court and the American public. The legal authority of Lawrence will emerge as that conversation unfolds, both because of changes in constitutional culture and because of the progressive integration of Lawrence into the institutional practices of constitutional adjudication.

Part IV offers brief concluding thoughts. It summarizes the generic tensions that the Court must characteristically negotiate. The Court must maintain the distinctly legal authority of constitutional law, and yet it must also embed constitutional law within the beliefs and values of nonjudicial actors. To put the point epigrammatically and provocatively, the Court must find a way to articulate constitutional law that the nation can accept as its own.

If constitutional law emerges from an ongoing dialectic between constitutional culture and the institutional practices of constitutional adjudication, it is neither autonomous nor fixed. Judges and lawyers will continue to appeal to the autonomy of constitutional law, however, precisely to the extent that they believe that an independent and determinate constitutional law is the necessary foundation for judicial authority to constrain democratic legislation. That is why the autonomy of constitutional law still haunts constitutional jurisprudence, even though academics have long repudiated it as a descriptively or theoretically adequate account of our constitutional order. Part IV concludes by suggesting that judicial authority might best be reconceived as a relationship of trust that courts forge with the American people. Constitutional law is not the ground of this relationship, but rather its consequence.

I.

Beginning in 1997 in City of Boerne v. Flores, and culminating last Term in Hibbs, the Rehnquist Court has introduced an entirely new framework for analyzing the scope of Congress’s power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate

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legislation, the provisions of this article." The essential premise of this framework is that Congress can enact Section 5 legislation "to enforce" rights that the judiciary would protect in litigation pursuant to Section 1 of the Fourteenth Amendment, but that Congress cannot use its Section 5 power to enforce Congress’s own independent interpretation of Section 1. As Hibbs announced last Term, it "falls to this Court, not Congress, to define the substance of constitutional guarantees," because "[t]he ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch."

I shall call this framework of analysis the "enforcement model." The purpose of the enforcement model is to prevent Congress from trespassing into the domain of constitutional law. The enforcement model holds that Congress can use its Section 5 power to create statutory rights which "enforce" constitutional rights that courts are prepared to enforce, but that Congress cannot use its Section 5 power to enforce constitutional rights that Congress independently believes merit protection.


40 Section 1 of the Fourteenth Amendment, in its relevant part, provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

41 Hibbs, 123 S. Ct. at 1977. The Court added:

Section 5 legislation reaching beyond the scope of § 1’s actual guarantees must be an appropriate remedy for identified constitutional violations, not "an attempt to substantially redefine the States’ legal obligations." We distinguish appropriate prophylactic legislation from "substantive redefinition of the Fourteenth Amendment right at issue," by applying the test set forth in City of Boerne: Valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Id. at 1977-78 (citations omitted) (quoting Kimel, 528 U.S. at 81, 88; and Boerne, 521 U.S. at 520).

42 Id. at 1977 (quoting Kimel, 528 U.S. at 81) (internal quotation marks omitted).


44 Reva Siegel and I have introduced the following nomenclature, which is designed to simplify discussion of these questions. We use the term "R_u" to represent rights contained in Section 5 legislation; "R_i" to represent constitutional rights that a court would enforce in adjudication to implement Section 1 of the Fourteenth Amendment; and "R_c" to represent constitutional rights that Congress independently believes merit legal protection. Using this terminology, the enforcement model can be succinctly summarized to provide that Congress can enact R_u to enforce R_i, but not to enforce R_c. Id. at 1953-54.
The Court offers a potentially generous account of the power to "enforce," holding that Congress can use its Section 5 power to create statutory rights that remedy the present effects of past violations of judicially enforceable rights, or that prophylactically prevent present or future violations of such rights. But the Court insists that Section 5 empowers Congress only to enact legislation that is theoretically explicable in terms of rights protected in constitutional adjudication. Congress cannot use its Section 5 power to enforce its own interpretation of the Constitution. Ultimately the enforcement model expresses the Rehnquist Court's belief that constitutional law must be strictly separated from constitutional culture.

The Rehnquist Court has created two doctrinal tests designed to "distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue.'" The first, articulated two Terms ago in Board of Trustees of the University of Alabama v. Garrett, is that Congress cannot enact Section 5 legislation unless it has first "identified a history and pattern of unconstitutional . . . state transgressions." I shall refer to this as the Garrett requirement. It holds that a prerequisite of Section 5 power is a documented record of state violations of judicially protected rights. The second test, first articulated in 1997 in Boerne, is that Section 5 legislation must be congruent and proportional to rights that a court would protect in constitutional adjudication. "Lacking such a connection," the Court fears, "legislation may become substantive in operation and effect." In the years since Boerne the Court has applied these tests with devastating effect, closely binding Congress's Section 5 power to the Court's interpretations of Section 1.

At issue in Hibbs was a private action for damages against the State of Nevada to enforce the family leave provisions of the FMLA.

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45 See id. at 1960–64. Reva Siegel and I term these justifications for R, respectively, the "remedial" principle and the "prophylactic" principle. The Court is even prepared to permit Congress to use its Section 5 power to enact R, that congressional factfinding establishes are equivalent to R. Siegel and I call this justification for R, the "identity" principle. Id. at 1961.
46 Hibbs, 123 S. Ct. at 1977–78 (quoting Kimel, 528 U.S. at 81).
48 Id. at 368.
49 See City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").
50 Id.
51 Several cases are especially noteworthy in this regard. See Garrett, 531 U.S. 356 (2001) (preventing Congress from using its Section 5 power to remedy disability discrimination); United States v. Morrison, 529 U.S. 598 (2000) (preventing Congress from using its Section 5 power to regulate nonstate actors); Kimel, 528 U.S. 62 (2000) (preventing Congress from using its Section 5 power to remedy age discrimination).
52 The plaintiff in the case had sued the state of Nevada for alleged violations of 29 U.S.C. § 2612(a)(1)(C) (2000), which provides that "an eligible employee shall be entitled to a total of 12
These provisions require employers, including states, to provide eligible employees with up to twelve weeks of unpaid leave in order to care for ill family members. In past decisions the Court has held that the Eleventh Amendment prohibits Congress from authorizing private damage actions against unconsenting states except when Congress is legislating pursuant to its powers under the enforcement clauses of the Reconstruction Amendments, like Section 5. Nevada sought to defend against the action by invoking its Eleventh Amendment immunity, even though Congress had explicitly invoked its authority under Section 5 in enacting the FMLA. Nevada accordingly argued that the family leave provisions of the FMLA were beyond the Section 5 power of Congress.

The Court in Hibbs analyzed the case within the framework of the enforcement model, reasoning that “Section 5 legislation must be an appropriate remedy for identified constitutional violations, not ‘an attempt to substantively redefine the States’ legal obligations.’” The opinion applied both the Garrett requirement and the congruence and proportionality test of Boerne. It stated that Congress can use its Section 5 power only if it first “show[s] a pattern of state constitutional violations,” and that Section 5 legislation must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”

In a six to three decision authored by Chief Justice Rehnquist, Hibbs held that the family leave provisions of the FMLA were “congruent and proportional to [their] remedial object,” and that they could “be understood as responsive to, or designed to prevent, unconstitutional behavior.” The holding was unanticipated, because in the

workweeks of leave during any 12-month period...
years since Boerne the Court had invalidated every exercise of Section 5 power that it had confronted. Indeed, in the 2000 Term Rehnquist had authored the Court’s opinion in Board of Trustees of the University of Alabama v. Garrett holding that Title I of the Americans with Disabilities Act of 1990 (ADA) was not a proper exercise of Section 5 power, even though Congress had compiled an extensive record of discrimination against the disabled.

Garrett scrutinized the legislative history of the ADA and pronounced it inadequate to justify Section 5 legislation, despite the fact that Congress had enacted the ADA only after it had “compiled a vast legislative record documenting ‘massive, society-wide discrimination’ against persons with disabilities.” Congress had held thirteen separate congressional hearings and created a special task force that "held

principle, see supra note 45 and accompanying text, the FMLA would be valid Section 5 legislation if it were justified as required to prevent present or future violations of R, which are conceived as sex-based discriminations in the provision of family leave. Most of the time, Hibbs reasons within the framework of the prophylactic principle. It argues that the FMLA is necessary "to protect the right to be free from gender-based discrimination in the workplace." Hibbs, 123 S. Ct. at 1978; see also id. at 1979 ("[T]he persistence of such unconstitutional discrimination by the States justifies Congress’ passage of prophylactic § 5 legislation."). At other times, however, Hibbs gestures toward the remedial principle, see supra note 45 and accompanying text, noting that the sex-neutral requirements of the FMLA are necessary “to combat the stereotypes about the roles of male and female employees” that are the legacy of past constitutional violations. Hibbs, 123 S. Ct. at 1981; see also id. ("Congress was justified in enacting the FMLA as remedial legislation."); id. at 1981 n.10 ("Congress sought to adjust family leave policies in order to eliminate their reliance on and perpetuation of invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace."). When reasoning from the remedial principle, Hibbs justifies the FMLA as valid Section 5 legislation on the ground that it is required to eliminate the present effects of past violations of R, which are conceived as prior sex-based discriminations in the provision of family leave.

See supra note 51 and accompanying text; Greenhouse, supra note 9, at A18 ("[Hibbs was] an unexpected turn in the court’s federalism revolution.").


hearing in every State, attended by more than 30,000 people, including thousands who had experienced discrimination first hand.”

The Court in Garrett unsympathetically sifted through this mountain of evidence and concluded that it contained only “half a dozen examples” of unconstitutional state discrimination against disabled persons.

The legislative record of “unconstitutional behavior” documented by Congress before enacting the FMLA, by contrast, was far weaker. It consisted chiefly of evidence suggesting that states granted maternity leave far more generously than they granted paternity leave, and two scraps of general testimony to the effect that in both public and private sectors parental leave tended to be distributed unequally between the sexes. Not only did the Court make no effort to demonstrate that these inequalities were unconstitutional, but the evidence entirely concerned sex discrimination in the provision of parental and maternity leave, so that there was no evidence whatever of constitutional violations in the provision of the kind of leave to care for sick family members specifically at issue in Hibbs. Measured by the standards applied by Rehnquist in Garrett, the legislative record in Hibbs was virtually barren of specific allegations or examples of relevant unconstitutional state discrimination.

In Hibbs, however, Chief Justice Rehnquist was undeterred by the weakness of the legislative record. He explained that whereas the ADA had sought to remedy disability discrimination, which in Fourteenth Amendment litigation merits only rational basis review, the FMLA sought instead to prevent gender discrimination, which in Fourteenth Amendment litigation “triggers a heightened level of scrutiny.” “Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test[,] . . . it was easier for Congress to show a pattern of

66 Id.; see also TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, FROM ADA TO EMPowerMENT 16 (Oct. 12, 1990).
67 Garrett, 531 U.S. at 369.
70 See id. at 1988 (Kennedy, J., dissenting).
71 For a powerful doctrinal argument that they were in fact constitutional, see id. at 1990–91; and infra note 99.
73 For a discussion of Garrett’s appeal to rational basis review, see Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 IND. L.J. 1, 3–12 (2003) [hereinafter Post & Siegel, Protecting the Constitution].
74 See supra note 60 and accompanying text.
75 Hibbs, 123 S. Ct. at 1982.
state constitutional violations.” The logic of Hibbs thus reflects the premise of the enforcement model. Hibbs reasoned that Congress can more easily demonstrate the existence of unconstitutional gender discrimination because the Court, in its own Section 1 jurisprudence, presumes that gender-based classifications are unconstitutional.

Hibbs is truly startling, however, for a second and ultimately less easily explicable reason. The opinion offers an extraordinarily generous account of the constitutional harm of sex discrimination, which it locates in “firmly rooted” “stereotype-based beliefs about the allocation of family duties” that operate to the disadvantage of women in “situations in which work and family responsibilities conflict.” Hibbs holds that in enacting the FMLA Congress properly sought “to adjust family leave policies in order to eliminate their reliance on and perpetuation of invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace.” This conception of the relevant constitutional violation is quite distant from narrower formulations, which the Court tends to use in Section 1 litigation, and which associate the constitutional prohibition of sex discrimination either with explicit classifications based upon sex or with neutral government actions taken “because of,” not merely “in spite of,” [their] adverse effects upon” women. Although Hibbs refers time and again to the pervasive

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76 Id. I should note that Rehnquist’s argument is slightly misleading, because sex-based discrimination is not “easier” to demonstrate in the context of discrimination that is facially neutral, see, e.g., Pers. Adm’r v. Feeney, 442 U.S. 256, 271-72 (1979), and yet Rehnquist seeks to demonstrate that Congress has met the Garrett requirement in part because “Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways.” Hibbs, 123 S. Ct. at 1980.

77 The Court has held that in litigation to enforce the Equal Protection Clause, classifications based upon sex are to receive elevated scrutiny because “[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.” City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985); see also Hibbs, 123 S. Ct. at 1979 (“The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny ....”). This assumption of widespread gender stereotyping surely underlies the ease with which Hibbs is prepared to accept the claim that the FMLA properly addresses “a ‘difficult and intractable proble[m],’” manifested by “subtle discrimination that may be difficult to detect on a case-by-case basis.” Id. at 1982 (alteration in original) (quoting Kimel v. Florida Board of Regents, 528 U.S. 62, 88 (2000)).

78 Hibbs, 123 S. Ct. at 1979.

79 Id. at 1979 n.5.

80 Id. at 1981 n.10; see also id. at 1981 (noting that Congress sought to “combat the stereotypes about the roles of male and female employees”). Hibbs explicitly held that the elimination of such stereotypes represents “a ‘difficult and intractable proble[m].’” Id. at 1982 (alteration in original) (quoting Kimel, 528 U.S. at 88).

81 Feeney, 442 U.S. at 279. This very Term the Court has reiterated that “[w]e have made clear that ‘[p]roof of racially discriminatory intent or purpose is required’ to show a violation of the Equal Protection Clause.” City of Cuyahoga Falls v. Buckeye Cnty. Hope Found., 123 S. Ct. 1289, 1298 (2003).
harms of sex stereotyping, it never demonstrates a pattern of violations that a court would find violates Section 1 of the Fourteenth Amendment.

The view of sex discrimination advanced by Hibbs is particularly unexpected because Rehnquist had previously authored opinions for the Court upholding legislation embodying sex stereotypes in the context of statutory rape and of the military draft. As a young Assistant Attorney General in the Justice Department, Rehnquist had even expressed reservations about some supporters of the Equal Rights Amendment (ERA) because of their "dislike and distaste for the traditional difference between men and women in the family unit." Of


Considered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the abrogation of States' sovereign immunity. The few incidents identified by the Court "fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."...

Our concern with gender discrimination, which is subjected to heightened scrutiny, as opposed to age- or disability-based distinctions, which are reviewed under rational standard, does not alter this conclusion. The application of heightened scrutiny is designed to ensure gender-based classifications are not based on the entrenched and pervasive stereotypes which inhibit women's progress in the workplace. This consideration does not divest respondents of their burden to show that "Congress identified a history and pattern of unconstitutional employment discrimination by the States."... Given the insufficiency of the evidence that States discriminated in the provision of family leave, the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem would not alone support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws.

The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own.

Hibbs, 123 S. Ct. at 1991-92 (Kennedy, J., dissenting) (citations omitted).

82 See Michael M. v. Superior Court, 450 U.S. 494, 471-73 (1981) (plurality opinion) (holding that a statutory rape law that applies only when the victim is female does not violate the Equal Protection Clause because "[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity").

83 See Rostker v. Goldberg, 453 U.S. 57, 82-83 (1981) (holding that an act authorizing the President to require men, but not women, to register for a military service draft does not violate the Fifth Amendment).

84 Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Leonard Garment, Special Consultant to the President, reprinted in Rehnquist: ERA Would Threaten Family Unit, LEGAL TIMES, Sept. 15, 1986, at 4. Rehnquist noted:

I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different role in this regard.

Id. Rehnquist warned that the ERA itself threatened the transformation of "holy wedlock" into "holy deadlock," in part because of its potentially "adverse effect on the family unit as we have known it." Id.
course it is possible that in recent years Rehnquist may have fundamentally altered his view of sex discrimination, but a more plausible explanation of *Hibbs* is that Rehnquist was concerned to write the opinion in a way that would avoid a major constitutional controversy over the constitutional status of Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination and which Congress used its Section 5 power to apply to the states in the Equal Employment Opportunity Act of 1972 (EEOA).

The Court well appreciated at the time it was considering *Hibbs* that its decision would have important implications for the constitutionality of the EEOA. If the Court were to decide *Hibbs* by using the same harsh doctrinal tests that it had applied in *Garrett* to conclude that Title I of the ADA was not within the Section 5 authority of Congress, it is likely that important provisions of Title VII would be struck down as beyond Congress’s Section 5 power.

Title VII, for example, prohibits certain facially neutral government regulations that have a “disparate impact” on women, even

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On the other side of the ledger, it is also appropriate to note that Rehnquist did testify on behalf of the Nixon administration in favor of the ERA, albeit with a noticeable degree of ambivalence. *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208, and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92d Cong. 324 (1971) (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice); see also Post & Siegel, Legislative Constitutionalism, supra note 43, at 1992 n.146.

85 Evidence exists for and against this hypothesis. See Linda Greenhouse, *Evolving Opinions: Heartfelt Words From the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3 (“And what of Chief Justice Rehnquist’s solicitude for the usefulness of the Family and Medical Leave Act in erasing the ‘pervasive sex-role stereotype that caring for family members is women’s work’? His daughter, Janet, is a single mother who until recently held a high-pressure job and sometimes had child-care problems. Several times this term, the 78-year-old Chief Justice of the United States left work early to pick up his granddaughters from school. Not evolution, perhaps, but life.”). *Compare* United States v. Virginia, 518 U.S. 515, 558, 565–66 (1996) (Rehnquist, C.J., concurring) (concluding that Virginia’s maintenance of an all-male military academy violated the Equal Protection Clause, although suggesting that integration was unnecessary if an equivalent female academy was created), *with* Nguyen v. INS, 533 U.S. 53, 59–60, 73 (2001) (joining Justice Kennedy’s majority opinion upholding a statute that makes it easier for a child born overseas, out of wedlock, and with only one parent who is a U.S. national, to gain U.S. citizenship if the mother is a citizen than if the father is a citizen).


though the Court has held that in constitutional adjudication such neutral regulations are legitimate unless they are motivated by a discriminatory purpose. \footnote{See Pers. Adm'r v. Feeney, 442 U.S. 256, 274 (1979) (citing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971)); Washington v. Davis, 426 U.S. 229, 239 (1976).} Whereas the Court has held that classifications based upon pregnancy are not classifications based upon sex for purposes of judicial enforcement of the Equal Protection Clause, \footnote{Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978).} Congress in 1978 enacted the Pregnancy Discrimination Act (PDA), \footnote{Id. Congress passed the PDA to overrule the Court's conclusion in General Electric Co. v. Gilbert, 429 U.S. 125, 136-37 (1976), that the constitutional reasoning of Geduldig should apply to Title VII. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983). Because the Court has already upheld Congress's Section 5 power to apply Title VII to the states, see Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), the PDA is now enforceable against states even though it was explicitly enacted to create a different and more encompassing rule of sex discrimination than that currently articulated by the Court in litigation to enforce the Equal Protection Clause. On the resulting tension, see Doran & Mason, supra note 91, at 41-43; and Hartley, supra note 91, at 88-89.} which provides that discrimination based upon pregnancy is prohibited discrimination based upon sex for purposes of Title VII. \footnote{Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001). Although Title VII was based on Congress's Section 5 power as well as on its commerce power, see Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249-50 (1964), its prohibition of discrimination based upon sex was added at the last moment without a legislative record of any kind. See County of Washington v. Gunther, 452 U.S. 161, 190 n.4 (1981) (Rehnquist, J., dissenting); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE 115-16 (1983). Congress's extension of Title VII to the states in 1972, see supra p. 19, also lacked the specific findings required by Garrett. Both the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare issued reports addressing the extension of Title VII to state and local government employers under the EEOA. In urging passage of the Act, both Committees cited the Civil Rights Commission's 1969 report, For All the People... By All the People, for evidence of racial discrimination...} Neither in its enactment of Title VII in 1964, nor in its enactment of the EEOA in 1972, did Congress document "a history and pattern of unconstitutional...state transgressions" \footnote{See Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974); see also Bray v. Alexandria Women's Health Clinic, 444 U.S. 484, 496 n.20 (1974); see also Bray v. Alexandria Women's Health Clinic, 444 U.S. 484, 496 n.20 (1974); see supra p. 19, also lacked the specific findings required by Garrett. Both the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare issued reports addressing the extension of Title VII to state and local government employers under the EEOA. In urging passage of the Act, both Committees cited the Civil Rights Commission's 1969 report, For All the People... By All the People, for evidence of racial discrimination...} in a manner that would...
satisfy the *Garrett* requirement.\(^96\)

There are many indications that Rehnquist crafted the *Hibbs* opinion precisely to foreclose these challenges to Title VII. Rehnquist's diffuse definition of the constitutional harm of sex discrimination, which focuses on policies that incorporate and perpetuate "invalid stereotypes" and that create "gender-based barriers to the hiring, retention, and promotion of women in the workplace,"\(^97\) blurs the constitutional distinction between intentional discrimination and facially neutral government regulations that have a disparate impact on women.\(^98\) Rehnquist goes out of his way to characterize the PDA as an unsuccessful effort "to address" the "problem" of "mutually reinforcing stereotypes" that cause "subtle discrimination that may be difficult to detect on a case-by-case basis."\(^99\) Rehnquist pointedly


\(^96\) Thus a month after the *Hibbs* decision, the Court of Appeals for the Seventh Circuit ruled that Title VII's prohibition of discrimination on the basis of religion was not a valid exercise of Section 5 authority. *Endres v. Ind. State Police*, 334 F.3d 618, 628–30 (7th Cir. 2003). The Court of Appeals argued:

[ Whereas *Hibbs* had] stressed that, before enacting the FMLA, Congress had compiled a record of subtle sex discrimination reflected in employers' leave policies[, b]efore enacting Title VII, Congress had not compiled such a record of subtle discrimination against religious practices. In 1964 the legislature concentrated on race discrimination; religion and sex were afterthoughts. There was no legislative record at all in the Senate, where the bill was not referred to committee, lest it be bottled up by opponents. *Id.* at 629.

\(^97\) *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1981 n.10 (2003); *see also supra* note 80 and accompanying text.

\(^98\) Hence Justice Kennedy's frustration in dissent:

Even if there were evidence that individual state employers, in the absence of clear statutory guidelines, discriminated in the administration of leave benefits, this circumstance alone would not support a finding of a state-sponsored pattern of discrimination. The evidence could perhaps support the charge of disparate impact, but not a charge that States have engaged in a pattern of intentional discrimination prohibited by the Fourteenth Amendment. *Hibbs*, 123 S. Ct. at 1989 (Kennedy, J., dissenting) (citing *Garrett*, 531 U.S. at 372–73 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976))).

\(^99\) *Hibbs*, 123 S. Ct. at 1982. The passage reads:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.
describes Title VII as an effort to respond to a long and uncontroversially documented history of official sex discrimination:

The history of the many state laws limiting women's employment opportunities is chronicled in — and, until relatively recently, was sanctioned by — this Court's own opinions... Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, ... and we sustained this abrogation in Fitzpatrick. But state gender discrimination did not cease. "[I]t can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination . . . in the job market." . . . The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in Fitzpatrick, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation.100 If the "pervasive" fact of sex discrimination means that state constitutional violations "can hardly be doubted," then Hibbs simultaneously vindicates both the FMLA and Title VII as proper Section 5 legislation.

It is clear that the Court would provoke a major political confrontation were it to hold that the application of important aspects of Title

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Hibbs, 123 S. Ct. at 1982 (second alteration in original) (citations omitted).

Justice Kennedy, by contrast, was concerned to insist that "[o]ur cases make clear that a State does not violate the Equal Protection Clause by granting pregnancy disability leave to women without providing for a grant of parenting leave to men." Hibbs, 123 S. Ct. at 1990 (Kennedy, J., dissenting). Justice Kennedy therefore discounted most of the Court's evidence of state constitutional violations, observing that they merely reflected differential treatment based upon pregnancy. Id. Justice Kennedy argued, for example:

The Court treats the pregnancy disability scheme of . . . Louisiana . . . [as] a disguised gender-discriminatory provision of parenting leave because the scheme would permit leave in excess of the period Congress believed to be medically necessary for pregnancy disability. The Louisiana statute, however, granted leave only for "that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions." [LA. REV. STAT. ANN. § 23:1008(A)(2)(b) (West Supp. 1993) (repealed 1997)]. Properly administered, the scheme, despite its generous maximum, would not transform into a discriminatory "4-month maternity leave for female employees only."

Hibbs, 123 S. Ct. at 1990 (Kennedy, J., dissenting).

100 Hibbs, 123 S. Ct. at 1978–79 (citations omitted) (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).
VII to states was an illegitimate exercise of Section 5 authority. In the years since Boerne the Court has used its new enforcement model of Section 5 power primarily to invalidate statutes of relatively low political salience. The nation’s conviction that an essential mission of the federal government is the prevention of racial and gender discrimination is an enduring legacy of the civil rights revolution of the 1960s and of the feminist transformation of the 1970s. This conviction would be forcefully challenged were the Court to hold that important dimensions of Title VII were beyond Congress’s Section 5 power. Hibbs is carefully written to avoid the firestorm of protest that would surely result from such a challenge.

Even as Hibbs explicitly announces that “[t]he ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch,” and even as it propounds doctrine designed to exclude Congress from the province of constitutional interpretation, Hibbs is written in a way that bends the Court’s own Section 5 jurisprudence to accommodate, rather than override, a deep-seated popular understanding, embodied in the EEOA, that a central task of the federal government is the elimination of race- and sex-based discrimination. Hibbs blurs the Court’s own

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101 We might take as a measure of this confrontation the enactment of the Civil Rights Act of 1991, which has properly been termed “a massive rebuke to the” Court’s efforts to dilute the protections of Title VII. Merrill, supra note 5, at 631.


103 The origins in the civil rights revolution of the belief that the federal government ought to combat racial discrimination are recounted in Post & Siegel, Equal Protection by Law, supra note 90, at 486–502; the origins in the triumph of second wave feminism of the belief that the federal government ought to combat sex discrimination are recounted in Post & Siegel, Legislative Constitutionalism, supra note 43, at 1984–2004. Although United States v. Morrison, 529 U.S. 598 (2000), also involved the question of sex discrimination, the Court’s holding in the case did not in any way threaten the scope or reach of Title VII. This is because Morrison concerned Congress’s ability to define state action in a way that differed from the Court’s definition. Morrison did not endanger Title VII’s authority to regulate private sex discrimination, which remains securely grounded in Congress’s Commerce Clause power, nor did it concern Title VII’s authority to regulate public sex discrimination.

104 Hibbs, 123 S. Ct. at 1977 (quoting Kimel, 528 U.S. at 81) (internal quotation marks omitted).

105 Justice Stevens was so disturbed by this approach that he concurred separately “[b]ecause I have never been convinced that an Act of Congress can amend the Constitution and because I am uncertain whether the congressional enactment before us was truly ‘needed to secure the guarantees of the Fourteenth Amendment.’” Id. at 1984 (Stevens, J., concurring) (quoting Fitzpatrick v.
account of unconstitutional sex discrimination in order to facilitate congressional legislation that evidences a different understanding of unconstitutional sex discrimination. If Hibbs on the surface uncompromisingly reaffirms the central premise of the enforcement model, which is that constitutional law is to be made by the Court alone and is to be strictly autonomous from Congress’s understanding of the Constitution, the actual holding of Hibbs seems to suggest the contrary message that the Court’s capacity to establish effective constitutional law is dialectically connected to constitutional culture.  

Bitzer, 427 U.S. 445, 458 (1976) (Stevens, J., concurring)) (internal quotation marks omitted). Stevens argued that Hibbs should have been decided on the ground that Congress can abrogate Eleventh Amendment immunity when acting pursuant to its Commerce Clause power. Id. at 1985. This conclusion, of course, would immunize both the FMLA and Title VII from constitutional challenge.

Justice Kennedy, in a dissent joined by Justices Scalia and Thomas, avoided the potential controversy over Title VII in a different way. Kennedy shifted the focus of analysis from separation of powers to federalism. Id. at 1986 (Kennedy, J., dissenting). In City of Boerne v. Flores, 521 U.S. 507, 520 (1997), and in every subsequent decision concerning the power of Congress under Section 5 of the Fourteenth Amendment, the Court has explained the function of the congruence and proportionality test in terms of distinguishing Section 5 legislation that enforces R₁ from Section 5 legislation that enforces R₃. The congruence and proportionality test asks whether the R₃ established by Section 5 legislation are sufficiently connected to R₁ to permit the conclusion that R₃ are enforcing R₁, thereby safeguarding the “cardinal rule of constitutional law” that “ever since Marbury this Court has remained the ultimate expositor of the constitutional text.” Morrison, 529 U.S. at 616 n.7; see also Post & Siegel, Legislative Constitutionalism, supra note 43, at 1960–65; supra note 44. The Court has thus explained the test in terms of the constitutional values of separation of powers, not those of federalism.

In his dissent in Hibbs, however, Justice Kennedy explicitly restated the congruence and proportionality test to ask “whether subjecting States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States.” Hibbs, 123 S. Ct. at 1986 (Kennedy, J., dissenting). This reformulation of the test subtly but fundamentally shifts the focus of analysis from the question of whether R₃ are sufficiently connected to R₁ to permit the conclusion that R₃ are enforcing R₁, to the question of whether R₃ are sufficiently connected to R₃ to justify the burdens that R₃ place upon states. In Hibbs, Kennedy used the congruence and proportionality test to ask whether “States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits.” Id. at 1987. He accordingly transformed the test into a means of balancing the protection of constitutional rights against the burdens imposed on states by Section 5 legislation. This balancing test enabled Kennedy to condemn the FMLA while at the same time upholding Title VII. Kennedy concluded that the FMLA’s requirement of twelve weeks of unpaid leave was not a congruent and proportional response to state sex discrimination, whereas “the abrogation of state sovereign immunity pursuant to Title VII was a legitimate congressional response to a pattern of gender-based discrimination in employment.” Id. at 1994.

We can appreciate the power of the latter message if we inquire into the origins of the sex discrimination jurisprudence that the Court claims to apply in *Hibbs*. The Court came to conclude that gender classifications should receive elevated scrutiny because it was educated by the evolving constitutional beliefs and values of nonlegal actors, as manifested by congressional legislation. At a time when the Court was still subjecting gender classifications to rational basis review, Congress was using its Section 5 power to pass the EEOA prohibiting states from discriminating on the basis of sex. In response to the political mobilization of second wave feminism, which transformed the ways in which Americans constitutionally regarded equality between the sexes, Congress came to conclude that “[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.”

The Court eventually reformed its own conception of constitutional law to reflect the change in constitutional culture evidenced by statutes like the EEOA, in the process graciously acknowledging in Justice Brennan’s plurality opinion in *Frontiero v. Richardson* the Court’s

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108 See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective. . . . We hold that it does not.”); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (holding that although the Constitution “precludes irrational discrimination, . . . [t]his Court is certainly not in a position to gainsay such belief by the Michigan legislature” that no woman can work as a bartender unless she is the wife or daughter of the male owner); see also *Hibbs*, 123 S. Ct. at 1978 (“The history of the many state laws limiting women’s employment opportunities is chronicled in — and, until relatively recently, was sanctioned by — this Court’s own opinions. . . . Until our decision in *Reed* . . ., ‘it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any “basis in reason” — such as the above beliefs — ‘could be conceived for the discrimination.’” (citations omitted) (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).
109 See supra note 87.
111 In the words of Justice Ginsburg:
What caused the Court’s understanding to dawn and grow? Judges do read the newspapers and are affected, not by the weather of the day, as distinguished Constitutional Law Professor Paul Freund once said, but by the climate of the era. Supreme Court Justices, and lower court judges as well, were becoming aware of a sea change in United States society. Their enlightenment was advanced publicly by the briefs filed in Court and privately, I suspect, by the aspirations of the women, particularly the daughters and granddaughters, in their own families and communities.

112 411 U.S. 677 (1973) (Brennan, J.) (plurality opinion).
debt to Congress’s articulation of the transformation in national understandings of the significance of sex discrimination. Far from claiming that equal protection doctrine should be autonomous from constitutional culture, the plurality opinion in \textit{Frontiero} openly defended its decision to look to the changing constitutional beliefs of Congress as a source for its own reconstruction of constitutional law.

It is striking, therefore, that although \textit{Hibbs} purports to employ the enforcement model to compel Congress to conform to the Court’s own jurisprudence of sex discrimination, that jurisprudence itself derives from changes in constitutional culture reflected in Congress’s innovative constitutional interpretations. If Rehnquist’s obfuscation of that jurisprudence in \textit{Hibbs} can perhaps be explained as an effort to avoid confrontation and so conserve the Court’s “exhaustible” supply of “prestige and institutional capital,” \textit{Frontiero’s} explicit incorporation of popular understandings into the Court’s own doctrine cannot. The Court’s decision in the 1970s to alter its equal protection doctrine to disfavor gender classifications was not a mere attempt to escape controversy. It was an effort to understand the legal requirements of the constitutional equality principle, and it used as one source of that understanding the evolving constitutional culture of the nation.

It is precisely this effort, however, that the Rehnquist Court has constructed the enforcement model to suppress. “If Congress could define its own powers by altering the Fourteenth Amendment’s meaning,” \textit{Boerne} declares:

> no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” . . . Under this approach, it is difficult to conceive of a principle that would limit congressional power. . . .

Shifting legislative majorities

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113 Justice Brennan explained:

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of “race, color, religion, sex, or national origin.” Similarly, the Equal Pay Act of 1963 provides that no employer . . . ”shall discriminate . . . between employees on the basis of sex.” And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

\textit{Id.} at 687–88 (alteration and second omission in original) (final emphasis added) (footnotes omitted). Needless to say, this kind of acknowledgment of congressional influence is directly contrary to the spirit of the Court’s post-\textit{Boerne} jurisprudence.

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could change the Constitution and effectively circumvent the difficult and
detailed amendment process contained in Article V. 115

This is superficially a passage about self-interest and the nature of
constitutional limitations. If Congress could make constitutional law, Boerne argues, the Constitution would no longer function to “limit
congressional power,” and thus the competence to make constitutional
law must lie instead in the judiciary. But if one asks why congres-
sional interpretive power would “effectively circumvent the difficult
and detailed amendment process contained in Article V,” the passage
begins to tell a different tale. From a purely logical point of view,
Congress can use its interpretations of the Constitution to limit its own
legislative power, just as the Court uses its interpretations of Article
III to limit its own judicial power. So if congressional interpretive au-
thority would disable constitutional restraints, it must not be merely
because Congress would be setting the limits of its own power. 116

It seems rather that Boerne is implying that Congress ought not to
interpret the Constitution because Congress would read the Constitu-
tion in a certain kind of way, in a political manner driven by the winds
of “shifting legislative majorities.” The Constitution, Boerne asserts, is
meant to establish legal limits on representative government, and le-
gality necessitates the informed and sober judgments that the judiciary
alone is designed to provide. 117 The Court must remain “the ultimate
expositor of the constitutional text” 118 because it embodies a steady
and professional form of reason that is immune from the gusts of po-
litical passion that shake institutions like Congress.

What, then, do we make of a decision like Frontiero, in which a
plurality opinion of the Court self-consciously, in the exercise of its le-

115 City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (first omission in original) (citations omit-
ted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). This passage is analyzed in
detail in Post & Siegel, Protecting the Constitution, supra note 73, at 18–30.

116 But see Ruth Bader Ginsburg, An Overview of Court Review for Constitutionality in the
United States, 57 LA. L. REV. 1019, 1022 (1997) (referring to “the important idea (expressed
by James Madison in Federalist No. 10) that ‘[n]o man is allowed to be a judge in his own cause.’
Congress, one could conclude following that principle, cannot say with finality whether its own
acts are constitutional. That function is properly committed to a separate department — a
detached, impartial, life-tenured judiciary that is not judging its own cause.” (alteration in origi-
nal)).

117 Hence the important distinction between the judge and the legislator, which we express by
saying that the duty of a judge is “to uphold the law and to follow the dictates of the Constitu-
tion,” not to “serve a constituency.” Republican Party of Minn. v. White, 122 S. Ct. 2528, 2547
(2002) (Stevens, J., dissenting); see also id. at 2551 (Ginsburg, J., dissenting) ("Legislative and ex-
ecutive officials serve in representative capacities. They are agents of the people; their primary
function is to advance the interests of their constituencies. . . . Judges, however, are not political
actors. They do not sit as representatives of particular persons, communities, or parties; they
serve no faction or constituency. . . . They must strive to do what is legally right, all the more so
when the result is not the one ‘the home crowd’ wants.").

gal and professional judgment, incorporates into its view of constitutional law the "shifting" view of sex discrimination that was revealed in the political enactments of Congress? There are two possibilities: either the Court in the exercise of its professional reason is to be trusted to pick and choose among the evolving forms of constitutional culture manifested in congressional legislation,\(^1\) or it is not. The first alternative denies the autonomy of constitutional law, the second affirms it. Boerne was itself a "transitional case"\(^2\) that equivocated between these alternatives.

The Court's subsequent Section 5 opinions, however, have come down heavily on the side of affirming the autonomy of constitutional law. The natural implication of the plurality opinion's reasoning in Frontiero is that Section 5 legislation should be encouraged, because it offers resources to the Court in its ongoing effort to incorporate the best of constitutional culture into the construction of a vibrant and legitimate constitutional law.\(^3\) But the Court's decisions in the after-

\(^1\) In performing this task, the Court might function according to the model of common law constitutional adjudication lucidly explained by David A. Strauss. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 900–93 (1996) (describing how the common law model explains the role of moral judgments in constitutional interpretation); see also Washington v. Glucksberg, 521 U.S. 702, 767–68 (1997) (Souter, J., concurring) (asserting that substantive due process "calls for a court to assess the relative 'weights' or dignities of the contending interests, and to this extent the judicial method is familiar to the common law"); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 35–36 (1992) [hereinafter Stevens, *Bill of Rights*] ("I firmly believe that the Framers of the Constitution expected and intended the vast open spaces in our charter of government to be filled not only by legislative enactment but also by the common-law process of step-by-step adjudication that was largely responsible for the development of the law at the time this nation was conceived. That process has largely eliminated the use of coerced confessions in criminal trials, curtailed racial discrimination in the selection of juries, and extended First Amendment protection to artistic protection as well as to political speech." (footnotes omitted)); John Paul Stevens, *The Meaning of Judicial Activism, Address Before the Chicago Bar Association* (Sept. 16, 1998), in CBA RECORD, Oct. 1998, at 40, 44, 47; id. at 44 (noting that "judge-made law is as old as the common law itself"); cf. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476–78 (2001) (detailing how the Court chose to adopt gender equality jurisprudence from constitutional culture without new textual support). But see Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 298 (2001) (arguing that the Constitution's text plays a more significant role in our constitutional tradition than Strauss contends).


\(^3\) It is for this reason that Reva Siegel and I have recently argued that the enforcement model of Garrett and Hibbs is fundamentally misguided. See Post & Siegel, *Legislative Constitutionalism*, supra note 43. I will not repeat those arguments here, but suffice it to say that the dialectical relationship between constitutional law and popular constitutional culture suggests that the Court should understand Section 5 as "a structural device that fosters the democratic legitimacy of our constitutional order." *Id.* at 1945. This understanding strongly supports the recognition of independent congressional authority to interpret the Fourteenth Amendment. *Id.* at 2026–32.
CULTURE, COURTS, AND LAW

math of Boerne have moved in the opposite direction; they have so stringently bound Congress to the Court's own views of constitutional law as to imply that the Court firmly understands the enforcement model to entail the autonomy of constitutional law. The Court's recent decisions suggest that the Court believes that it has nothing to learn from Congress.

These decisions break decisively with the Court's pre-Boerne precedents. Without sacrificing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution,"122 both the Warren and the Burger Courts had established a Section 5 jurisprudence that recognized and encouraged Congress's capacity to interpret the Constitution in ways that might prove helpful to the Court. In decisions like Katzenbach v. Morgan123 and City of Rome v. United States,124 the Court consistently held that Congress was to be accorded such substantial "discretion"125 in exercising its "responsibility for implementing the Amendment"126 that dissenters complained that the Court had effectively ceded to Congress the power to "determine as a matter of substantive constitutional law what situations fall within the ambit" of the Equal Protection Clause.127 Essentially the Court in the years before Boerne modeled its Section 5 jurisprudence on the premise that there was a dialectical relationship between constitutional law and constitutional culture. In its decisions after Boerne the Court has forcefully repudiated this premise.128

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122 Cooper v. Aaron, 358 U.S. 1, 18 (1958).
125 Morgan, 384 U.S. at 651.
126 Id. at 648; see also City of Rome, 446 U.S. at 176. Although Rome technically concerned Section 2 of the Fifteenth Amendment, "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive." Id. at 207 n.1 (Rehnquist, J., dissenting).
127 City of Rome, 446 U.S. at 221 (Rehnquist, J., dissenting) (quoting Oregon v. Mitchell, 400 U.S. 112, 296 (Stewart, J., concurring in part and dissenting in part)) (internal quotation marks omitted); see also id. at 219-20 ("The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority group's ability to elect a candidate of their race violates the Fourteenth or Fifteenth Amendment."); Morgan, 384 U.S. at 668 (Harlan, J., dissenting) ("In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment.").
128 See Post & Siegel, Legislative Constitutionalism, supra note 43, at 1960-66. To appreciate the enormity of the transformation that the Rehnquist Court has wrought in its post-Boerne jurisprudence, consider how fundamentally the Garrett requirement, which requires Congress to document a "pattern of unconstitutional . . . state transgressions" before exercising its Section 5 power, differs from Justice Powell's understanding of Congress's prerogatives:

Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than
At stake in our characterization of the autonomy of constitutional
law is how we understand the nature of the Constitution itself. The
belief that constitutional law ought to be independent from constitu-
tional culture implies that the Constitution is also independent of con-
stitutional culture. Chief Justice Rehnquist, for example, who has
been a primary author of the stringent version of the enforcement
model,\textsuperscript{129} has been clear that the Constitution should be regarded as a
document of positive law, without connections to the beliefs and values
of the American people. If a democratic society "adopts a constitution
and incorporates in that constitution safeguards for individual liberty,"
then, in Rehnquist's view:

\begin{quote}
[W]e must understand that such safeguards possess value neither because
of any intrinsic worth nor because of any unique origins in someone's idea
of natural justice but instead simply because they have been incorporated
in a constitution by the people. . . . The laws that emerge after a typical
political struggle in which various individual value judgments are debated
likewise take on a form of moral goodness because they have been enacted
into positive law. It is the fact of their enactment that gives them what-
ever moral claim they have upon us as a society, however, and not any in-
dependent virtue they may have in any particular citizen's own scale of
values.
\end{quote}

Beyond the Constitution and the laws in our society, there simply is no
basis other than the individual conscience of the citizen that may serve as
a platform for the launching of moral judgments. There is no conceivable
way in which I can logically demonstrate to you that the judgments of my

impartial, to make policy rather than to apply settled principles of law. The petitioners'
contention that this Court should treat the debates on § 103(f)(2) as the complete "re-
cord" of congressional decisionmaking underlying that statute is essentially a plea that
we treat Congress as if it were a lower federal court. But Congress is not expected to act
as though it were duty bound to find facts and make conclusions of law. The creation of
national rules for the governance of our society simply does not entail the same concept
of recordmaking that is appropriate to a judicial or administrative proceeding. Congress
has no responsibility to confine its vision to the facts and evidence adduced by particular
parties. Instead, its special attribute as a legislative body lies in its broader mission to
investigate and consider all facts and opinions that may be relevant to the resolution of
an issue. . . .

Acceptance of petitioners' argument would force Congress to make specific factual
findings with respect to each legislative action. Such a requirement would mark an un-
precedented imposition of adjudicatory procedures upon a coordinate branch of Gov-
ernment. Neither the Constitution nor our democratic tradition warrants such a con-
straint on the legislative process.

\textit{Fullilove}, 448 U.S. at 502–03 (Powell, J., concurring); \textit{see also Fullilove}, 448 U.S. at 478 (opinion
of Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appro-
priate with respect to judicial or administrative proceedings.").

\textsuperscript{129} Rehnquist was the author of the Court's opinions in \textit{Garrett} and \textit{Morrison}. \textit{See} Bd. of Trs.
conscience are superior to the judgments of your conscience, and vice versa.\textsuperscript{130}

If there are no common social values, but only conflicting preferences, some of which manage to find enactment in positive law, then indeed constitutional law can have nothing to learn from culture.\textsuperscript{131}

Of all the members of the contemporary Court, it is Justice Scalia who is most theoretically and temperamentally committed to preserving the sharpest separation of constitutional law from culture. Scalia derives this position from his understanding of the Constitution, which, he asserts, "is in its nature the sort of 'law' that is the business of the courts — an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."\textsuperscript{132} Scalia believes that judicial review would be incomprehensible "if the Constitution were not that sort of a 'law,' but [instead] a novel invitation to apply current societal values."\textsuperscript{133}

Indeed, Scalia argues, it is precisely because the Constitution is autonomous from culture that it can fulfill its "whole purpose," which

\textsuperscript{130} Rehnquist, supra note 16, at 704; see also Sue Davis, Justice Rehnquist and the Constitution 152 (1989) (asserting that Rehnquist believes in a "moral relativism" that "holds that no value is more legitimate than any other until it is enacted into the positive law"); Linda Greenhouse, The Last Days of the Rehnquist Court: The Rewards of Patience and Power, 45 Ariz. L. Rev. 251, 259 (2003) (agreeing with Davis's observations).

\textsuperscript{131} Robert Bork also takes this position. See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 9 (1971) ("Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure."). For a detailed discussion of the implications of Bork's view for the broader concept of constitutional culture, see Robert Post, Theories of Constitutional Interpretation, REPRESENTATIONS, Spring 1990, at 13, 33.

\textsuperscript{132} Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 854 (1989). The complete passage reads:

Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. That power is, however, reasonably implicit because, as Marshall said in Marbury v. Madison, (1) "[t]he judicial department is emphatically the province and duty of the judicial department to say what the law is," (2) "[i]f two laws conflict with each other, the courts must decide on the operation of each," and (3) "the constitution is to be considered, in court, as a paramount law." Central to that analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of "law" that is the business of the courts — an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a "law," but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding that sort of novel enactment, that "[i]t is emphatically the province and duty of the judicial department" to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and its determination that a statute is compatible with the Constitution should, as in England, prevail.

\textit{Id.} (alterations in original) (first emphasis added).

\textsuperscript{133} \textit{Id.}
“is to prevent change — to embed certain rights in such a manner that future generations cannot readily take them away.” Courts that consider “current societal values” in formulating constitutional law contradict this “antievolutionary purpose” by creating “what is called The Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society.” Such courts also risk undermining the democratic will of those who ratified the Constitution, substituting “their own predilections for the law.” Scalia advocates originalism as a philosophy of constitutional interpretation because it avoids these consequences, and because it emphasizes that the “interpretation of the Constitution . . . is essentially lawyers’ work — requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth.”

Scalia counts as a distinct advantage of his approach that it will “embolden” judges “to be courageous” and to “stand up to what is generally supreme in a democracy: the popular will.” If the courts are

134 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997); see also THOMAS MACINTYRE COOLEY, 1 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 124 (8th ed. 1927) (“A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law.”).

135 SCALIA, supra note 134, at 44.
136 Id. at 38.
137 Id. at 40.
138 Scalia, supra note 132, at 863. Scalia continues: Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely. Nonoriginalism, which under one or another formulation invokes “fundamental values” as the touchstone of constitutionality, plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are “fundamental to our society.”

139 SCALIA, supra note 134, at 46.
140 Scalia, The Rule of Law, supra note 138, at 1180. Chief Justice Rehnquist has reflected on whether “judges respond to public opinion” in William H. Rehnquist, Constitutional Law and Public Opinion, 20 SUFFOLK U. L. REV. 751, 752, 768–69 (1986). Rehnquist writes: [If the] tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse. This is not a case of judges “knuckling under” to public opinion, and cravenly abandoning their oaths of office. Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.

141 Id. at 768.
free to write the Constitution anew,” Scalia acidly observes, “they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights . . . .”141 By sharply distinguishing constitutional law from “current societal values,” by insisting that constitutional meaning is a matter for the technical and professional reason of lawyers and not for the culture of “We the People,” by holding “it no business of the courts (as opposed to the political branches) to take sides in” cultural disagreements,142 Scalia is able to demand that courts exercise an absolutely uncompromising independence that is indifferent to popular opposition. This unbending professional autonomy is surely one reason why Scalia is the only Justice in Hibbs to author an opinion that is entirely unconcerned about the possibility of intense political controversy over Title VII.143

Writing for himself alone, Scalia argues in Hibbs that Congress can enact “prophylactic” legislation “to ‘enforce’ the Fourteenth Amendment” against a state only if it is first shown that there “is a violation by the State against which the enforcement action is taken.”144 Scalia believes that this strict rule is necessary because “[t]here is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.”145 This is an extraordinarily harsh and provocative rule, so excessive that Rehnquist does not even bother to respond to it. It is almost certainly

141 SCALIA, supra note 134, at 47. Scalia queries whether we have noticed that “increasingly, the ‘individual rights’ favored by the courts tend to be the same ‘individual rights’ favored by popular majoritarian legislation? Women’s rights, for example; racial minority rights; homosexual rights; abortion rights; rights against political favoritism?” Id. Scalia continues: The glorious days of the Warren Court, when the judges knew that the Constitution means whatever it ought to, but the people had not yet caught on to the new game (and selected their judges accordingly), are gone forever. Those were the days when genuinely unpopular new minority rights could be created — notably, rights of criminal defendants and prisoners. That era of public naiveté is past, and for individual rights disfavored by the majority I think there are hard times ahead.

Id. at 149.


143 See supra note 105.

144 Nev. Dep’t of Human Res. v. Hibbs, 123 S. Ct. 1972, 1985 (2003) (Scalia, J., dissenting). Scalia writes that “[Section] 5 prophylactic legislation” can be “applied against a State” only if it is first shown that “the State has itself engaged in discrimination sufficient to support the exercise of Congress’s prophylactic power.” Id. at 1986.

145 Id. at 1985. Thus Scalia writes: Today’s opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by [the family leave provisions of the FMLA] was in violation of the Fourteenth Amendment. It treats “the States” as some sort of collective entity which is guilty or innocent as a body. . . . This will not do. Prophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else.

Id.
incorrect on the merits, because it confuses the judicial power of allocating individual blame and responsibility with the legislative power granted to Congress by Section 5. Apart from the merits of Scalia’s position, however, it is noteworthy that he advances a rule that virtually invites vigorous confrontation over the validity of Title VII as legitimate Section 5 legislation.

Scalia is an extreme case, of course, primarily because he is so conspicuously committed to the logical implications of his own jurisprudence, regardless of political consequences. To the extent that the Rehnquist Court has adopted a central premise of Scalia’s jurisprudence, however, we can learn a good deal from his example. Scalia’s separate dissent reveals the inner logic of the conviction that constitutional law should be independent from constitutional culture. The dissent reminds us that severing constitutional law from constitutional culture can have subtle but palpable consequences for the conduct of judicial review. If the Rehnquist Court now seems more confident and less deferential to the popular branches of government than its predecessors, one cause may perhaps be the influence of this jurisprudential perspective, which underlies the Court’s development of the enforcement model in its recent Section 5 jurisprudence.

We should be clear, however, that while Hibbs says one thing, it actually does another. Even as Hibbs announces that only the Court has the prerogative to enunciate constitutional law, it applies a form of sex discrimination jurisprudence that the Court learned from changes in constitutional culture reflected in Congress’s constitutional interpretations. Even as Hibbs reaffirms doctrinal tests designed to sever constitutional law from constitutional culture, it interprets the Court’s own Section 5 jurisprudence in a way that manifests the interdependence of

146 Judicial power exists to adjudicate controversies, and it typically involves the assignment of individual guilt and liability. Because we believe in principles of individual responsibility, we require courts to function in a way that precludes guilt by association. Legislatures, by contrast, are forbidden from allocating individual guilt and responsibility. The essence of legislative power instead lies in the establishment of general rules of conduct. It is therefore misguided to understand Section 5 legislation as accusing particular states of wrongdoing, or as punishing them for past misconduct. Instead Section 5 legislation, like all legislation, seeks to vindicate public values. For this reason Section 5 legislation, like all legislation, is not to be restricted by rules appropriate for the proper functioning of a court. See Post & Siegel, Protecting the Constitution, supra note 73, at 13–16 (criticizing the Garrett Court for failing to draw this distinction); cf. South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966) (“Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment.”). In essence, Scalia’s argument boils down to the proposition that Section 5 power is to be understood on the model of a judicial remedy. This proposition fails to appreciate that Section 5 is a grant of legislative power, not judicial power. See Post & Siegel, Legislative Constitutionalism, supra note 43, at 1969–70.

147 For a powerful argument concerning the extent to which the Rehnquist Court has adopted this premise, see Kramer, supra note 5, at 14.

148 See supra note 9.
judicial doctrine and popular constitutional beliefs. These contradictions depict a Court that is implicitly forced to retreat from what it is anxious to explicitly announce, a Court that declares but cannot establish that constitutional law is categorically distinct from constitutional culture. The claimed autonomy of constitutional law, in other words, should not be taken as an accurate description of how the Court actually functions. It should instead be understood as an ideological assertion about how the Court desires constitutional law to be regarded.

Political scientists and historians who study the Court from an external perspective have little patience with this assertion. They regard the notion that constitutional law is independent of the general constitutional culture of the nation as little more than a "legal fiction." Even the slightest glance at the historical development of American constitutional law confirms H. Jefferson Powell’s conclusion that our "[c]onstitutional law is historically conditioned and politically shaped." Our constitutional law has continuously evolved to reflect the changing beliefs of the nation. Even though the text of the Equal Protection Clause "has been as immutable as the Stonehenge monument," its meaning has altered dramatically. The most telling example is Brown v. Board of Education, in which the Court "burst asunder the shackles of original intent" to express a new vision of

149 Charles A. Beard & William Beard, The American Leviathan: The Republic in the Machine Age 39 (1930) ("[T]he theory that the Constitution is a written document is a legal fiction. The idea that it can be understood by a study of its language and the history of its past development is equally mythical. It is what the Government and the people who count in public affairs recognize and respect as such, what they think it is."). Political scientists have expressed similar views on this topic. See, e.g., Robert A. Dahl, Democracy and Its Critics 190 (1989) ("[T]he views of a majority of justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); Terri Jennings Peretti, In Defense of a Political Court 80-132 (1999) (arguing that political motivations should, and do, play a role in the Supreme Court’s jurisprudence); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model 72-73 (1993) (presenting the “attitudinal” model of judicial decisionmaking, in which outcomes are based primarily on the ideologies of each judge); Keith E. Whittington, Taking What They Give Us: Explaining the Court’s Federalism Offensive, 51 Duke L.J. 477, 480-86 (2001) (setting forth attitudinal and institutional models of judicial decisionmaking).


151 Justice O’Connor has recently emphasized this point in her discussion of the history of constitutional sex discrimination law, noting that change in constitutional law comes "principally from attitudinal shifts in the population at large. Rare indeed is the legal victory — in court or legislature — that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive institutions." Sandra Day O’Connor, The Majesty of the Law 166 (2003).

152 Stevens, Bill of Rights, supra note 119, at 27.


equal protection that was based upon its own appreciation of the "present" nature of "American life throughout the Nation."155

This history suggests an account of the Constitution that differs fundamentally from that expressed by Rehnquist or Scalia. The Constitution is not a document only of positive law. It is not primarily a "lawyer’s contract,"156 nor is it even chiefly a constraint on majoritarian enactments.157 It is rather an expression of the deepest beliefs and convictions of the American nation, of our "fundamental principles as they have been understood by the traditions of our people and our law."158 Woodrow Wilson expressed this conception of the Constitution when he observed that "the Constitution of the United

155 Brown, 347 U.S. at 492–93. On Brown’s response to 1950s America, see PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 238 (1999); RICHARD KLUGER, SIMPL[103]E JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 748 (1977); and Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. PA. L. REV. 1, 67–69 (1998). At the time of the Brown decision, the New York Times wrote: [The decision "does not necessarily mean that the justices are of finer judicial clay than their predecessors .... It merely means that they ... have felt behind them the solid weight of public opinion established at vastly higher levels of humaneness and democratic understanding. It is that state of public opinion, even more than the decision that interpreted it, which gives us our feeling of [hopefulness] regarding prospects for tomorrow's better living."]

Public Gets Credit for School Bias Ban, N.Y. TIMES, Sept. 7, 1954, at io (quoting Lester Granger, then-Executive Director of the National Urban League). Reflecting on the evolution of equal protection doctrine, the Court has explained:

[The decision "does not necessarily mean that the justices are of finer judicial clay than their predecessors .... It merely means that they ... have felt behind them the solid weight of public opinion established at vastly higher levels of humaneness and democratic understanding. It is that state of public opinion, even more than the decision that interpreted it, which gives us our feeling of [hopefulness] regarding prospects for tomorrow's better living."]

Plessy v. Ferguson, 163 U.S. 537 [(1896)]. Seven of the eight Justices then sitting subscribed to the Court’s opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954 — more than a half-century later — we repudiated the "separate-but-equal" doctrine of Plessy as respects public education we stated: “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written.” Brown v. Board of Education, 347 U.S. 483, 492 [(1954)].


157 See CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 44 (2001) (" Constitutions do not merely limit government; they also establish it.").

158 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also Anthony M. Kennedy, The Impact of Experience on Judicial Decisionmaking, L.A. DAILY J., Feb. 3, 1993, at 6 ("The law is the story of human history. The meaning of the common law system is that the rules of law, the principles of obligation and duty, arise from our shared experience, our common heritage.").
States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”

To fashion constitutional law based on this understanding of the Constitution is to reject the autonomy of constitutional law. It is to approach the Constitution in a way that at most allows the Court to “speak before all others” about the nation’s “constitutional ideals.” These ideals are the principles that “give our society an identity and inner coherence” because they represent “our whole experience” as a nation. It is virtually unimaginable that the Court’s articulation of these principles should find their ground exclusively in the professional opinions of judges, without some dialectical connection to the actual political self-conception of the nation. The articulation of constitutional law thus requires “that judges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well.”

The dependence of constitutional law on this continuing dialogue counsels restraint in the exercise of judicial review. This is because the legitimacy of judicially fashioned constitutional law is understood to depend upon its grounding in constitutional culture. Alexander Bickel, for example, has noted that because “coherent, stable — and morally supportable — government is possible only on the basis of consent,” and because “the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account,” constitutional law can never in the end rest simply on the pronouncements of the Court. Instead, “[v]irtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representa-

159 Woodrow Wilson, Constitutional Government in the United States 69 (1908).
163 See Post, supra note 131, at 23–26, 28–35.
164 The literature describing this dialectical connection is quite extensive. For a sampling, see supra note 106. For a powerful demonstration of the dependence of constitutional law on popular understandings, see 1 Bruce Ackerman, We the People: Foundations (1991); and 2 Bruce Ackerman, We the People: Transformations (1998). For an argument that Marbury-style judicial review presupposes that judges are enforcing the People’s document, not their own deviations, see Akhil Reed Amar, The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 84 (2000).
166 See id. at 1205–09 (criticizing Roe v. Wade because it “invited no dialogue with legislators,” but “[i]nstead . . . seemed entirely to remove the ball from the legislators’ court”).
Bickel observes that the Court's decisions must be taken up by the public before they can become fully law:

[To say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases, and in others it is a form of speech only. The effectiveness of the judgment universalized depends on consent and administration.

The Court is often incapable of generating the necessary consent by itself, and it does not command the resources of administration.

Bickel does not suggest that it is improper for the Court to seek to inspire or transform popular constitutional understandings, as it did in Brown. His point is rather that in the long run judicial interpretations of the Constitution will persist and acquire legitimacy only if the nation's commitments have in fact been altered. The Warren Court thoroughly understood this point, which is why from its very inception it sought to enlist the representative branches of the federal government in a common effort to alter constitutional culture. As Robert Burt notes, "[t]he Justices acknowledged among themselves that, in pragmatic terms at least, nothing would follow from the Brown decision unless support voluntarily came from the President and Congress." The Court in Brown accordingly asked for briefing on the question whether "future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish" school segregation, even if "neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools." Archibald Cox was thus exactly right to remark that "the principle of Brown v. Board of Education became more firmly law after its incorporation into . . . the Civil Rights Act of 1964."

If Brown illustrates how the Court can successfully provoke the transformation of constitutional culture, Frontiero illustrates how the Court can modify its own doctrine to accommodate changes in constitutional culture. The Court in the 1970s recognized that the norm

169 Id. at 91-92.
170 See id. at 91-94. As Justice Scalia observes, "the appointment and confirmation process will see to that." SCALIA, supra note 134, at 47.
175 See supra pp. 25-26.
of equality had altered in American constitutional culture,¹⁷⁶ and in
the progeny of *Frontiero* it invented a new constitutional jurispru-
dence of sex discrimination to express the legal implications of this
change.¹⁷⁷ In this way the Court maintained a rough alignment be-
tween its equal protection doctrine and the evolving constitutional
convictions of the country.¹⁷⁸ It is clear enough, I think, that if this
alignment between constitutional law and constitutional culture is not
maintained, if the Court attempts to enforce constitutional principles
that seriously diverge from popular constitutional beliefs, its authority
will soon be challenged. In the most extreme circumstances, persistent
judicial efforts to impose principles that are seriously at odds with the
constitutional understandings of the nation risk creating significant
crises, as occurred during the New Deal era or at the time of *Dred
Scott*.¹⁷⁹

From this historical and structural perspective, it seems most im-
plausible to claim that constitutional law is or should be autonomous
from constitutional culture. The claim sets itself against the felt neces-
sities of judging, which is why the Court’s opinion in *Hibbs* seems so
filled with internal contradictions. The Court wants to place strict
limits on Congress’s Section 5 lawmaking power in order to affirm the
autonomy of constitutional law, and yet, because the legitimacy of the
Court’s own doctrine depends upon constitutional culture, the Court
cannot bring itself to threaten the constitutionality of the EEOA. Only

¹⁷⁶ For an argument that legal norms of equality are themselves cultural practices that reflect
cultural understandings, see ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE
¹⁷⁷ Scalia would presumably disagree with this invention. He writes:
[What constitutes a denial of equal protection [is] ... the “time-dated” meaning of equal
protection in 1868. Unisex toilets and women assault troops may be ideas whose time
has come, and the people are certainly free to require them by legislation; but refusing to
do so does not violate the Fourteenth Amendment, because that is not what “equal pro-
tection of the laws” ever meant.

SCALIA, supra note 134, at 148–49.
¹⁷⁸ For an account of how equal protection jurisprudence changes in response to constitutional
culture, see Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassifica-
tion or Antisubordination*, in 2 ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF
Balkin and Siegel note that “application of the anticlassification principle often depends on judg-
ments concerning the presence, absence, or degree of status-harm . . . . These judgments may be
conscious or unconscious, explicit or implicit, and they shift in time, in response to social mobiliz-
ations and other developments.” Id.; see also Reva B. Siegel, *A Short History of Sexual Haras-
sment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva B.
Siegel eds.) (forthcoming 2003) (manuscript at 11–18, on file with the Harvard Law School Li-
brary) (“Judgments about whether practices discriminate ‘on the basis’ of sex or race may depend
on evolving social intuitions about whether a practice unjustly perpetuates a status regime, rather
than formal characteristics of the practice itself, as antidiscrimination discourse leads us to be-
lieve.”).
Scalia is willing to let the chips fall where they may, but the pressure of maintaining that position forces him to adopt an intemperate and unconvincing position. Scalia may display the virtue of carrying "things to their logical conclusion," but his opinion lacks wisdom. For most members of the Court, the autonomy of constitutional law remains an ideological conviction that is subject to modification as statesmanship requires.

The conviction matters, however, because it underwrites the Court's ongoing efforts to construe narrowly the scope and nature of congressional Section 5 power. These efforts have led the Court to invalidate legislation that previously would have been upheld. They have also signaled Congress that it cannot independently interpret the Constitution, which affects the roles, expectations, and behavior of members of Congress. They have suffocated Congress's constitutional participation and innovation, and discouraged forms of citizen mobilization that might seek to find expression in Section 5 legislation.

Most importantly, however, the ideological conviction of autonomy can make the Court oblivious to the complex and dialectical relationship between constitutional law and constitutional culture. Even if one adopts the strong position that the values of nonlegal actors should be incorporated into constitutional law if and only if this incorporation is necessary for the legitimacy and integrity of the law, there are still a myriad of ways in which this incorporation can occur. Some are routine and ordinary, while others are highly controversial. To claim that constitutional law must remain entirely autonomous from constitutional culture is to occlude clear thinking on exactly how the relationship between constitutional law and constitutional culture is actually constructed.

181 On Brandeis's view of the necessity for statesmanship in the creation of constitutional law, see Melvin I. Urofsky, The Brandeis-Frankfurter Conversations, 1985 SUP. CT. REV. 299, 314. William Howard Taft also found statesmanship imperative. In a letter congratulating George Sutherland on his appointment to the Supreme Court, Taft wrote:

   I do not minimize at all the importance of having Judges of learning in the law on the Supreme Bench, but the functions performed by us are of such a peculiar character that something in addition is much needed to round out a man for service upon that Bench, and that is a sense of proportion derived from a knowledge of how Government is carried on, and how higher politics are conducted in the State. A Supreme Judge must needs keep abreast of the actual situation in the country so as to understand all the phases of important issues which arise, with a view to the proper application of the Constitution, which is a political instrument in a way, to new conditions.

Letter from William Howard Taft to George Sutherland (Sept. 10, 1922), microformed on William H. Taft Papers, Reel 245 (Library of Cong., 1969).
182 See sources cited supra note 102. I believe that these statutes should in fact have been upheld as legitimate exercises of Congress's Section 5 power. See supra note 121 and accompanying text.
The question is not whether constitutional culture ought to be a source of constitutional law, because as a matter of history and structure constitutional interpretation is possible only because the Court engages in a continuous dialogue with the constitutional beliefs and values of nonjudicial actors. The useful question is instead how constitutional culture functions as a source for constitutional law. In Part II we shall examine in detail some of the many ways in which the Court constructs the membrane that separates constitutional law from constitutional culture. That membrane is in most situations highly porous, so that constitutional law is continuously infused with the constitutional beliefs and values of nonjudicial actors. But the Court can render the boundary between constitutional law and constitutional culture more impermeable if it comes to believe that popular attitudes threaten significant constitutional values, as is frequently the case when the Court protects constitutional rights. Even in such circumstances, however, even in the core precincts of constitutional rights, constitutional law and constitutional culture remain in continuous dialogue, as we shall see in our discussion of Grutter v. Bollinger.183

II.

Hibbs involves the relationship between constitutional law and constitutional culture. Constitutional culture comes in many forms, ranging from the convictions of ordinary citizens about the meaning of their Constitution to the considered constitutional interpretations of those authorized to make law based upon these interpretations. Section 5 legislation is a form of constitutional culture that lies at the extreme end of this spectrum. Congress enacts Section 5 legislation based upon its textually granted power “to enforce” the Fourteenth Amendment, so that Congress is on virtually equal footing with the Court, which also claims power to make constitutional law because of its authority to enforce the Constitution.184

For this reason Section 5 legislation can potentially challenge the Court’s authority to make constitutional law, even though Section 5 legislation differs fundamentally from judicial reasoning because statutes represent a form of constitutional interpretation that is neither bound by stare decisis nor embedded within a practice of discursive justification.185 It is therefore the rare occasion, like the plurality opinion in Frontiero, when the Court will feel secure enough to acknowl-

184 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).
185 For a discussion of the distinctions between judicial and legislative constitutional interpretation, see Post & Siegel, Legislative Constitutionalism, supra note 43, at 2005–07.
edge frankly the direct influence of Section 5 legislation on its own resolution of a disputed question of constitutional law. Far more typically the Court will attempt to disguise this influence, as it does in 

Hibbs.

Section 5 legislation, however, is not the only circumstance in which Congress interprets the Constitution with the force of law. Every statute enacted by Congress rests on an implicit congressional judgment that the statute both is within Congress’s constitutional power and does not violate constitutional rights. Not only does the Court appear comfortable with such judgments, but it has actually promulgated various doctrines designed to facilitate their incorporation into the Court’s own articulation of constitutional law. Quietly but pervasively, these doctrines use the constitutional beliefs of Congress as a source of judicially constructed constitutional law.

Exemplary is the Court’s decision last Term in 

Eldred v. Ashcroft. 186 At issue in 

Eldred was the constitutionality of the Copyright Term Extension Act (CTEA), 187 which prolonged the duration of existing and future copyrights by twenty years. In deciding that Congress could apply a copyright extension to existing copyrights, the Court candidly acknowledged the influence of “an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions.” 188 The Court held that “[s]uch consistent congressional practice is entitled to ‘very great weight.’” 189

A consistent congressional practice represents an enduring congressional judgment about the constitutionality of a particular rule. Because, as Thayer noted, the representative branches of government can act only by putting “an interpretation on the constitution,” and because such interpretations may survive for long periods before being challenged in court, if they are ever challenged at all, 190 a Court considering the legality of enduring interpretations must set its own independ-

188 Eldred, 123 S. Ct. at 778; see also Note, Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation, 116 HARV. L. REV. 1798, 1818 (2003).
190 Thayer, supra note 19, at 135–36.
ent construction of the Constitution against the historically settled convictions of the country. Although the Court always retains the prerogative to overturn these convictions,\textsuperscript{191} upsetting the entrenched constitutional beliefs of nonjudicial actors entails costs in terms of both stability and legitimacy.\textsuperscript{192} When dealing with consistent past congressional interpretations of the Constitution, the Court must balance these costs against whatever inclination it may have to articulate its own independent constitutional view. The doctrinal rule that consistent past congressional practices are entitled to "very great weight" is in essence a codification of this balance. It is a measure of how much constitutional culture should matter to the substantive formulation of constitutional law.

An analogous issue faces the Court whenever it reviews the constitutionality of congressional legislation. In such circumstances the Court must set its view of the Constitution's meaning against the understanding of Congress. Because this potential conflict is iterative, the ongoing relationship between the branches will be very much affected by the way in which the Court chooses to align its own view of constitutional law with the constitutional culture of Congress. If the Court gives no weight at all to that culture, considerable and perhaps even debilitating friction between the branches will inevitably develop.

It is not surprising, therefore, that the Court has sought to avoid this friction by a doctrinal rule analogous to that which it has applied to consistent past congressional practices. In the absence of specific countervailing considerations, like the potential violation of a constitutional right, the Court recognizes "the heavy presumption of constitutionality to which a 'carefully considered decision of a coequal and representative branch of our Government' is entitled."\textsuperscript{193} This presumption establishes what Thayer calls a "fitting modus vivendi be-

\textsuperscript{191} The Court has said that "historical acceptance" does not alone guarantee the constitutionality of a given practice, because "no one acquires a vested or protected right in violation of the Constitution by long use." Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 792 (1973) (quoting Walz v. Tax Commission, 397 U.S. 664, 678 (1972)) (internal quotation marks omitted); see also Eldred, 123 S. Ct. at 797 (Stevens, J., dissenting) ("[T]hat Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged.").

\textsuperscript{192} The Court has asserted that "an unbroken practice . . . is not something to be lightly cast aside." Marsh v. Chambers, 463 U.S. 783, 790 (1983) (quoting Walz, 397 U.S. at 678).

\textsuperscript{193} U.S. Dep't of Labor v. Triplet, 494 U.S. 715, 721 (1990) (quoting Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985)). Given his forceful denial of any relationship between constitutional law and constitutional culture, it is not surprising that Justice Scalia has recently discussed the possibility of eliminating this presumption. He has observed that "my court is fond of saying that acts of Congress come to the court with the presumption of constitutionality. . . . [I]f Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution[,] . . . then perhaps that presumption is unwarranted." Editorial, A Shot from Justice Scalia, WASH. POST, May 2, 2000, at A22 (quoting Justice Scalia) (internal quotation marks omitted).
tween the different departments,” which allows for “full co-
operation.” It means that the Court will not disturb the constitu-
tional judgment of Congress unless it has good reason. The presump-
tion of constitutionality is thus also a measure of how much constitu-
tional culture matters to the formulation of constitutional law.

The presumption of constitutionality is sometimes justified as the
“deference due to deliberate judgment by constitutional majorities of
the two Houses of Congress that an Act is within their delegated
power or is necessary and proper to execution of that power.” When
used in this way, “deference” seems to be a synonym for “respect.”

There are a number of explanations for why the Court ought to “re-
spect” the constitutional judgment of Congress. One is that interpreta-
tion of the Constitution ought to be responsive to democratic will, and
Congress is more democratically accountable than the Court. Not only
does this argument explicitly repudiate the autonomy of constitutional
law, it implies that constitutional culture ought to inform the articula-
tion of constitutional law unless the Court has good reason to think
otherwise.

A second and slightly less far-reaching explanation for why the
Court ought to “respect” the constitutional conclusions of Congress is
that the Court should defer to the particular kinds of judgments that
are peculiarly within the competence of Congress. The logic of such
derference is roughly that although the Court may retain authority to
articulate the rule of law governing the constitutionality of a statute, it
may for various reasons cede to Congress discretion to implement that
rule. Thus even if the Court holds as a matter of law that congres-

194 Thayer, supra note 10, at 152.
195 See Kramer, supra note 5, at 122 (noting that deference to Congress characteristic of the
New Deal settlement “restored to politics questions respecting the definition or scope of the powers
delegated by the Constitution to Congress and the Executive”).
196 United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953); see also Walters, 473 U.S.
at 319 (noting the “deference . . . we customarily must pay to the duly enacted and carefully con-
sidered decision of a coequal and representative branch of our Government”).
197 See, e.g., Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 196 (1997) (“We owe Congress’ find-
ings an additional measure of deference out of respect for its authority to exercise the legislative
power.”); cf. City of Boerne v. Flores, 521 U.S. 507, 531 (1997) (“Judicial deference, in most cases,
is based not on the state of the legislative record Congress compiles but ‘on due regard for the
decision of the body constitutionally appointed to decide.’” (quoting Oregon v. Mitchell, 400 U.S.
112, 207 (1970) (opinion of Harlan, J.).)
derference] to rationally based legislative judgments . . . reflects our respect for the institutional
competence of the Congress on a subject expressly assigned to it by the Constitution and our ap-
preciation of the legitimacy that comes from Congress’s political accountability in dealing with
matters open to a wide range of possible choices.” (citation omitted)).
199 For a discussion of the general logic of deference, see Robert C. Post, Between Governance
and Management: The History and Theory of the Public Forum, 34 UCLA L. REV. 1713, 1810–16
sional Commerce Clause power can be exercised to regulate intrastate transactions only if those transactions substantially affect interstate commerce, the Court may nevertheless "defer" to Congress's factfinding competence on the issue whether particular transactions do, in fact, substantially affect interstate commerce.\textsuperscript{200} Deference in this sense should be distinguished from "delegation," in which the Court cedes to Congress the authority to articulate the rule of law that defines constitutionality.\textsuperscript{201}

\textit{Eldred} well illustrates the logic of deference. Having determined that CTEA does not categorically violate the "limited Times" prescription\textsuperscript{202} of the Copyright Clause,\textsuperscript{203} a legal question as to which \textit{Eldred} gives "very great weight" to consistent past congressional practice,\textsuperscript{204} \textit{Eldred} turns to the distinct question of whether CTEA is "a rational exercise of the legislative authority conferred by the Copyright Clause."\textsuperscript{205} \textit{Eldred} announces that "we defer substantially to Congress" on this constitutional question.\textsuperscript{206} Because implementing the legal requirements of the Copyright Clause involves the question of how "an important public purpose may be achieved,"\textsuperscript{207} \textit{Eldred} explains

\begin{footnotesize}
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    \item \textsuperscript{200} See, e.g., \textit{Hodel v. Va. Surface Mining & Reclamation Ass'n}, 452 U.S. 264, 276–77 (1981). In \textit{Hodel}, the Court noted:
    The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.
    \textit{Id.} (citations omitted).
    \item \textsuperscript{201} On the distinction between deference and delegation, see Robert C. Post, \textit{The Management of Speech: Discretion and Rights}, 1984 SUP. CT. REV. 169, 215. Political question doctrine is the most conspicuous example of delegation. See, e.g., \textit{Nixon v. United States}, 506 U.S. 224, 228 (1993) (stating that if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," then it is that department, rather than the judiciary, which must decide the controversy (quoting \textit{Baker v. Carr}, 369 U.S. 186, 217 (1962))).
    \item \textsuperscript{202} \textit{Eldred v. Ashcroft}, 123 S. Ct. 769, 781 (2003).
    \item \textsuperscript{203} The Copyright Clause of the Constitution provides that "Congress shall have Power . . . [to] promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." \textit{U.S. CONST.} art. I, \S 8, cls. 1, 8.
    \item \textsuperscript{204} \textit{Eldred}, 123 S. Ct. at 785.
    \item \textsuperscript{205} \textit{Id.} at 781.
    \item \textsuperscript{206} \textit{Id.}
    \item \textsuperscript{207} \textit{Sony Corp. v. Universal City Studios, Inc.}, 464 U.S. 417, 429 (1984). \textit{Sony} conceptualizes the determination of the purpose of the Copyright Clause as a legal question, whereas it views the determination of how that purpose is to be achieved as a matter committed to legislative discretion. \textit{Sony} explains that the purpose of the Copyright Clause is "to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." \textit{Id.} It observes that "this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's com-}
\end{itemize}
\end{footnotesize}
that it entails "judgments of a kind Congress typically makes." 

"[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be." Deference is justified in such cases because the kinds of judgments necessary to apply the relevant constitutional rule either are better made by Congress or are beyond the institutional competence of the Court.

If the relationship between the Court and Congress is characterized as one of deference, it may seem that the Court retains control of constitutional law and excludes the influence of constitutional culture, which is relegated to the subordinate role of implementation. But this appearance is illusory, because the meaning of a legal rule cannot be easily distinguished from the scope of its implementation.

_Eldred_ illustrates this point in a startling passage that seeks to explain why the Court defers to Congress's exercise of Article I powers, like the power to create copyrights, but not to Congress's Section 5 power, to which the Court applies _Boerne_'s rigorous congruence and proportionality test. "Section 5," the Court explains, "authorizes Congress to enforce commands contained in and incorporated into the Fourteenth Amendment," whereas "[t]he Copyright Clause, in contrast, empowers Congress to define the scope of the substantive right. Judicial deference to such congressional definition is 'but a corollary to the grant to Congress of any Article I power.'"

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208 Eldred, 123 S. Ct. at 781. In _Miller-El v. Cockrell_, 123 S. Ct. 1029, 1041 (2003), a case last Term concerning habeas corpus appeals, the Court articulated a distinct ground for deference: "Deference is necessary because a reviewing court, which analyzes only the transcripts from _voir dire_, is not as well positioned as the trial court is to make credibility determinations." _Id._


210 See, e.g., Turner Broad. Sys., Inc. _v._ FCC, 520 U.S. 180, 195–96 (1997) ("We owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions." (citations omitted) (quoting _Turner Broadcasting System, Inc. v. FCC_, 512 U.S. 622, 665–66 (1994) (opinion of Kennedy, J.)) (quoting _Walters v. National Ass'n of Radiation Survivors_, 473 U.S. 305, 331 n.12 (1985))); Gen. Motors Corp. _v._ Tracy, 519 U.S. 278, 308 (1997) ("[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them."); _cf._ _Black & Decker Disability Plan v. Nord_, 123 S. Ct. 1965, 1971 (2003) ("Intelligent resolution of the question whether routine deference to the opinion of a claimant's treating physician would yield more accurate disability determinations, it thus appears, might be aided by empirical investigation of the kind courts are ill equipped to conduct.").

211 Cf. Ian Ayres & Paul M. Goldbart, _Optimal Delegation and Decoupling in the Design of Liability Rules_, 100 MICH. L. REV. 1, 17 n.38 (2001) (noting that "changing the type of 'protection' for an entitlement also actually changes the content of the entitlement").

212 _Eldred_, 123 S. Ct. at 788 (citation omitted) (quoting _Graham v. John Deere Co._, 383 U.S. 1, 6 (1966)).
This passage is remarkable not only because it utterly fails to explain why the congruence and proportionality test is appropriate for Section 5 legislation, but also because it seems to retreat from the Court’s claim to be “the ultimate expositor of the constitutional text.” It appears to say that the Court delegates to Congress the power “to define” the nature of its own Article I powers. Because I very much doubt that the Court intends this implication, I am inclined to read the passage as asserting merely that Congress can define the substantive scope of copyrights within the legal limits set by the Court, even if on this narrow interpretation *Eldred* does not elucidate why the Court defers to Congress’s exercise of Article I powers but not to the exercise of its Section 5 power.

The point I wish to stress, however, is that the Court’s misstep graphically illustrates the instability of distinguishing between the substance of a legal rule and the scope of its application. As the Court unconsciously but powerfully indicates in this passage, to control the implementation of a rule is in a very real sense to “define” its meaning. This implies that the analytic framework of deference, like that of the “presumption of constitutionality” and the “very great weight” accorded to consistent congressional practice, affords ample room for

213 The Copyright Clause does not give Congress the authority to define the copyright power; it gives Congress the power to authorize copyrights. U.S. CONST. art. I, § 8, cl. 8. If this empowers Congress to define what can and cannot be a copyright, it would follow in pari materia that Section 5 authorizes Congress to define what does and does not count as enforcing the Fourteenth Amendment. But of course, this is precisely what the congruence and proportionality test is meant to deny. See City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).


215 Read in this way, the passage would be inconsistent with the Court’s recent decisions that define and limit Congress’s power under the Commerce Clause. See, e.g., id. at 627 (holding that a federal civil remedy for gender-motivated violence exceeds Congress’s power under the Commerce Clause and Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that federal prohibition of firearms in a school zone exceeds Congress’s authority under the Commerce Clause).

216 This interpretation of the passage is consistent with the overall structure of *Eldred*, as well as with the language of *Graham*, 383 U.S. at 6, from which the passage quotes.

217 If Article I powers, like Section 5 power, must be exercised within the legal limits defined by the Court, then the relevant question is why the Court has chosen to impose stringent limits on the latter, but not the former. The answer to that question, I think, is that the Court perceives the exercise of Section 5 power as a threat to its interpretive monopoly, see Post & Siegel, *Protecting the Constitution*, supra note 73, at 17, whereas it does not perceive the exercise of Article I powers as threatening in the same way. This is not because Congress interprets the Constitution any less in exercising its Article I powers, but because the Court believes that congressional interpretation of Fourteenth Amendment rights is closer to the kind of constitutional interpretation routinely practiced by courts. Cf. Post & Siegel, *Legislative Constitutionalism*, supra note 43, at 2033 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting)) (recounting Justice Harlan’s objection to allowing Congress to define the substantive scope of the Fourteenth Amendment). Reva Siegel and I have argued that the Court’s perception of the danger of congressional interpretation of the Constitution in the exercise of its Section 5 power is largely misplaced. See id. at 2032–39.
constitutional culture to infiltrate and influence the substance of constitutional law.

Those who defend the autonomy of constitutional law are most likely to focus on protecting constitutional rights, rather than limiting congressional power, because the very purpose of constitutional rights is to defend constitutional values against the depredations of popular sentiments that may inform constitutional culture.\footnote{4} Footnote 4 of Carolene Products thus suggests that "[t]here may be narrower scope for operation of the presumption of constitutionality\footnote{4} in the protection of constitutional rights, precisely because such rights should be rendered impervious to constitutional culture.

This distinction between rights and powers, however, is far too coarse. The legal articulation of a right can include great room for presumptions of constitutionality. In First Amendment jurisprudence, for example, the Court sometimes defers to neutral time, place, and manner regulations of speech\footnote{20} because it believes, wrongly in my view,\footnote{21} that such regulations do not sufficiently endanger First Amendment values as to warrant more stringent review.\footnote{22} The Court

\footnote{18} See, e.g., supra pp. 31-33.
\footnote{20} See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989) (finding that the lower court "erred in failing to defer" to the city's sound-amplification guideline); see also Hill v. Colorado, 530 U.S. 703, 727 (2000) (counseling "a measure of deference to the judgment of the Colorado Legislature" regarding its regulation of the speech-related conduct of abortion protestors); Turner Broad. Sys. v. FCC, 520 U.S. 180, 195-96 (1997) (noting in a case concerning "must carry" provisions for cable television companies that "deference to Congress is in one respect akin to deference owed to administrative agencies").
\footnote{22} See, e.g., Turner Broadcasting, 520 U.S. at 641-42 (explaining that as distinct from the "most exacting scrutiny" applied to content-based restrictions, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" (citations omitted)). Similarly, the Court in Eldred rejected the idea that a copyright scheme should be subject to "uncommonly strict scrutiny." Eldred v. Ashcroft, 123 S. Ct. 769, 788 (2003). The Court concluded, wrongly in my view, that the "idea-expression dichotomy," coupled with the "fair use" defense, rendered "further First Amendment scrutiny ... unnecessary" to determine whether copyright legislation unduly impairs First Amendment values. Id. at 788-90. For an argument that the Court's conclusion was incorrect, see Brief of Jack M. Balkin et al. as Amici Curiae in Support of the Petitioners, Eldred (No. 01-618), available in 2002 WL 1041899, at *15-21. The First Amendment values at issue in Eldred concern the protection of public discourse, a structure of communication that "engenders the sense of participation, identification, and legitimacy necessary to reconcile individual with collective autonomy." Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REV. 1109, 1134 (1993). The Court is generally astute to apprehend the tension between the individual autonomy required by public discourse and legislation that seeks to embed persons within communitarian norms. See, e.g., Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 603 (1990) [hereinafter Post, Constitutional Concept] (discussing how Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), asserts that public discourse must be kept free from the domination of community norms). But if
will engage in stricter scrutiny, and hence fashion constitutional law to be more impervious to constitutional culture, when it believes that important First Amendment principles are more directly threatened.\footnote{223} The Court nicely articulated the point last Term in \textit{Federal Election Commission v. Beaumont},\footnote{224} a decision upholding a federal ban on direct corporate contributions "in connection with" certain federal elections.\footnote{225} The Court observed that "the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions" is that "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association."\footnote{226} The more salient the First Amendment value threatened by government regulation, the higher the degree of scrutiny the Court will apply, and the more autonomous constitutional law will become from constitutional culture.

The Court will thus vary the permeability of the membrane separating constitutional law from constitutional culture depending upon the importance of the constitutional value at stake and the degree to which government regulations presuppose the same individual autonomy as does the First Amendment, the Court is quite erratic in its ability to evaluate their potential damage to the structure of public discourse. \textit{Cf.} Robert C. Post, \textit{Rereading Warren and Brandeis: Privacy, Property, and Appropriation}, \textit{41} \textit{Case W. Res. L. Rev.} \textit{647}, \textit{665} n.94 (1991) (noting that courts are not careful to apply First Amendment protections when property rights are at stake, because property rights, like the First Amendment, conceptualize persons as autonomous). The Court does have the capacity and sometimes the will to make such an evaluation. \textit{See}, e.g., \textit{McIntyre v. Ohio Elections Comm'n}, \textit{514 U.S. 334}, \textit{347} (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." (citation omitted)). But the Court is frequently reluctant to conceive public discourse as a vulnerable sociological structure of communication that at times needs judicial protection in order to fulfill its constitutional function. \textit{Eldred} accordingly declined even to inquire whether CTEA's extended term burdened core political speech. My best guess is that this is because CTEA presupposes the same autonomy as does public discourse itself.\footnote{223} \textit{This is true, for example, when it reviews statutes that are content-based. \textit{See}, e.g., \textit{Turner Broadcasting}, \textit{512 U.S. at 641-42} ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); \textit{Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.}, \textit{502 U.S. 105}, \textit{115-16} (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").} \textit{Id. at 2200} (2003). \textit{Id. at 2203} (quoting \textit{2 U.S.C. § 441b(a)} (2000)). \textit{Id. at 2210} (quoting \textit{Federal Election Commission v. Massachusetts Citizens for Life, Inc.}, \textit{479 U.S. 238}, \textit{259} (1986)). The Court noted that "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." \textit{Id.}; \textit{see also United States v. Am. Library Ass'n}, \textit{123 S. Ct. 2297}, \textit{2310} (2003) (Breyer, J., concurring in the judgment) (stating that a statute which "directly restricts the public's receipt of information" should "[f]or that reason" receive greater scrutiny than rational basis review); \textit{id.} ("[W]e should not examine the statute's constitutionality as if it raised no special First Amendment concern — as if, like tax or economic regulation, the First Amendment demanded only a 'rational basis' for imposing a restriction. Nor should we accept the Government's suggestion that a presumption in favor of the statute's constitutionality applies.").
which the value is imperiled. This dynamic is plainly visible in the structure of equal protection doctrine. The Court is clear that "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." When applying this so called "rational-basis review," as the Court reminded us last Term:

The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

This standard of review allows constitutional culture to influence constitutional law at least as much as in the context of the Court's review of Congress's copyright power. The Court will apply "more exacting judicial scrutiny," however, when it believes that state action threatens a constitutional value specifically protected by the Equal Protection Clause.

The point can be illustrated by Justice O'Connor's separate opinion in Lawrence v. Texas, in which she concludes that the level of judicial scrutiny under the Equal Protection Clause should vary depending upon circumstances:

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227 This analysis suggests that the Court has typically allowed constitutional law and constitutional culture to commingle freely in the construction of federal power because the Court does not in that context typically perceive constitutional values to be threatened by constitutional culture. When the Court does perceive such threats, as for example when it concludes that Section 5 legislation endangers values associated with separation of powers, the Court will use doctrine like the congruence and proportionality test to suppress the influence of constitutional culture. The congruence and proportionality test thus functions just like strict scrutiny in the context of judicial protection of rights. See Stephen M. Griffin, Judicial Supremacy and Equal Protection in a Democracy of Rights, 4 U. Pa. J. Const. L. 281, 310-11 (2002).


231 An analogous structure is visible in the Court's due process doctrine. Sometimes the Court has interpreted the Due Process Clause to require that "a challenged state action implicate a fundamental right before requiring more than a reasonable relation to a legitimate state interest to justify the action." Washington v. Glucksberg, 521 U.S. 702, 722 (1997). At other times, however, the Court has conceived the Clause as balancing the significance of the constitutional liberty interest at stake against the strength of the state's interest in regulation. See id. at 765-68 (Souter, J., concurring in the judgment) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); see also Youngberg v. Romeo, 457 U.S. 307, 320 (1982) (balancing the individual interest in freedom of movement against the state interest in ensuring safety of mentally retarded patients). In either case, however, the strictness of the Court's scrutiny will vary with the constitutional value perceived to be at risk.

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." We have consistently held, however, that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.233

O'Connor postulates that different levels of judicial scrutiny are justified because some laws are more likely than others to be "rectified by the democratic processes." But this seems highly implausible. A more convincing explanation is that when legislation potentially trenches on a value specifically protected by the Equal Protection Clause, like the right not to be harmed merely because one belongs to an unpopular group, equal protection doctrine should become "more searching" in order to protect this constitutional value.

The Court has offered an analogous account of why it will engage in elevated scrutiny of classifications based upon race or gender. The Court has explained that it will more carefully review legislation involving race- or sex-based classifications because such legislation more directly threatens constitutional values. Classifications based upon "race, alienage, or national origin" receive strict scrutiny because

[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others. . . . Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.234

The doctrine of elevated scrutiny is designed to detect and eliminate racial "antipathy" and "outmoded notions" of gender because legislation based upon these perspectives is inconsistent with the constitutional values of the Equal Protection Clause, and because these

233 Id. at 2484–85 (omission in original) (citations omitted) (quoting Cleburne, 473 U.S. at 440; and U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).
234 Cleburne, 473 U.S. at 440–41 (alteration and second omission in original) (citation omitted) (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)).
perspectives suffuse constitutional culture. Elevated scrutiny thus constructs constitutional law as independent from a constitutional culture that may well reflect the very perspectives which the Court fashions elevated scrutiny to alter.

It is precisely in such circumstances, when doctrine is deployed as an instrument for the transformation of popular values, that we are most tempted to accept an account of constitutional law as autonomous from constitutional culture. This account captures a certain truth. Unlike rational basis review, where equal protection doctrine accepts and merges with constitutional culture, strict scrutiny establishes a fierce tension between constitutional law and constitutional culture. But the account is also misleading, because it obscures the question of how the Court acquires the constitutional values that it uses strict scrutiny to protect. We need to recall that the Court came to regard racial "antipathy" and "outmoded notions" of gender as inconsistent with the Equal Protection Clause not because of changes in the text of the Fourteenth Amendment, nor because of changes in the intent of the framers of the Fourteenth Amendment, but because American constitutional culture evolved in such a way as to render these practices intolerable.

We are thus brought face to face with a seeming paradox. If strict scrutiny protects values that originate in constitutional culture, why would strict scrutiny define itself in opposition to that culture? How can strict scrutiny be so independent from constitutional culture as to be an instrument for the modification of that culture, when strict scrutiny simultaneously seeks to instantiate values that derive from that culture? This conundrum importantly underlies Scalia's defense of the autonomy of constitutional law. Scalia suggests that constitutional law either can reflect popular attitudes, or it can restrain them, but it cannot do both. Given this choice, we had better conceive constitutional law as autonomous from constitutional culture if we wish to protect constitutional rights.

The force of this argument depends upon the way in which it imagines the relationship between constitutional law and constitutional cul-

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235 On the use of American antidiscrimination law as an instrument for the reshaping of existing social practices, see POST ET AL., supra note 176, at 22–41.
236 On gender, see supra pp. 24–26; on race, see supra pp. 35–36 and note 155.
237 See supra pp. 31–32. Justice Scalia writes:

A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect "current values." Elections take care of that quite well. The purpose of constitutional guarantees — and in particular those constitutional guarantees of individual rights [—] . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.

Scalia, supra note 132, at 862.
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ture. It assumes that constitutional culture is singular, so that constitutional law is put to the choice of either expressing that culture or opposing it. The Court sometimes explicitly fashions constitutional law on this assumption, as for example when it holds that the Eighth Amendment should be interpreted to implement "the evolving standards of decency that mark the progress of a maturing society,"\(^{238}\) or when it reads the Due Process Clause to protect "the basic values that underlie our society."\(^{239}\) Justice Kennedy last Term elegantly expressed this assumption about the relationship between constitutional law and constitutional culture when he read the Fifth Amendment to express "the ultimate moral sense of the community."\(^{240}\)

There may be circumstances in which it suffices to regard constitutional culture as singular in this way. But constitutional culture does not as a general matter have this character. Constitutional culture, like all culture, evolves in time.\(^{241}\) Even the second Justice Harlan, surely one of the greatest proponents of maintaining an intimate rela-

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\(^{238}\) Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)) (internal quotation marks omitted). Even Scalia seems to recognize the force of such standards, as for example when he remarks that he would be untrue to his originalism to the extent that "I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging." Scalia, supra note 132, at 864; see also Robert Post, Justice for Scalia, N.Y. REV. BOOKS, June 11, 1998, at 57, 60 (discussing the significance of Scalia's concession). Scalia adds, not implausibly, "[b]ut then I cannot imagine such a case's arising either." Scalia, supra note 132, at 864.


tionship between constitutional law and constitutional culture, it clearly recognized that the Due Process Clause should reflect a “tradition” that must be conceived as “a living thing.” Constitutional law can therefore enforce constitutional culture only by intervening in an ongoing process of historical development, so that constitutional law is always faced with the choice of encouraging or retarding these evolutionary changes. In such circumstances constitutional law neither transparently expresses nor autonomously regulates constitutional culture. Instead it intervenes to shape the development of that culture on the basis of its understanding of that culture. In this way constitutional law simultaneously reflects and restrains popular values.

If constitutional culture is not diachronically singular, it is also not synchronically singular. At any given moment in time, American constitutional culture, like all culture, is typically etched with deep divisions. It has even been observed that our constitutional culture consists of “an historically extended tradition of argument” whose “integrity and coherence . . . are to be found in, not apart from, controversy.” We can certainly trace the origins of strict scrutiny doc-

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243 Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Harlan writes that “[a] decision of this Court which radically departs from [that tradition] could not long survive, while a decision which builds on what has survived is likely to be sound.” Id.
244 It is noteworthy that Scalia has attempted to interpret the Due Process Clause in a way designed to escape this choice. He does not read the Due Process Clause as reflecting a living tradition, but instead as enforcing static values implicit in “the historic practices of our society.” Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (Scalia, J.) (plurality opinion). The “purpose” of the Due Process Clause, Scalia writes, “is to prevent future generations from lightly casting aside important traditional values — not to enable this Court to invent new ones.” Id. at 122 n.2. “[T]he Constitution that I interpret and apply,” Scalia has announced, “is not living but dead.” Antonin Scalia, God’s Justice and Ours, FIRST THINGS, May 2002, at 17, 17. In Scalia’s hands, therefore, due process doctrine need not choose between encouraging or retarding processes of cultural change, because the doctrine does not seek to express constitutional culture in the full complexity of its evolutionary nature. It instead aspires only to reflect past versions of that culture. Scalia opts for this approach because of his fear that judicial efforts to interpret culture would reflect merely “the predilections of those who happen at the time to be Members of this Court.” Michael H., 491 U.S. at 127 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)). The cost of Scalia’s approach is that the point and function of due process doctrine are rendered obscure. For a discussion, see infra pp. 93–95.
245 Recent anthropological theory portrays culture as “a site of social differences and struggles,” Richard Johnson, What Is Cultural Studies Anyway?, SOC. TEXT, Winter 1986/1987, at 38, 39, so that it is impossible “to conceive of cultural identity apart from the arenas of contest in which questions of identity arise and are perforce answered,” Carol J. Greenhouse, Constructive Approaches to Law, Culture, and Identity, 28 LAW & SOC’Y REV. 1231, 1240 (1994). See also Sally Engle Merry, Law, Culture, and Cultural Appropriation, 10 YALE J.L. & HUMAN. 575, 582–84 (1998) (discussing the “polyvalent, contestable messages” contained in the concept of culture).
246 POWELL, supra note 150, at 6. More generally, it has been said that “[a] living tradition . . . is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.” ALasdair MACINTYRE, AFTER
trine to such fierce arguments. In deciding Brown, for example, the Court essentially was imposing the constitutional culture of the North upon that of the South. In deciding Frontiero the Court was inter-
vening into a controversy about the nature of gender that was so in-
tense that (as we are now likely to forget) the proposed Equal Rights Amendment was actually defeated. To the extent that constitutional


247 See LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 490 (2000). The Framers of the Fourteenth Amendment were quite aware of sectional differences in constitutional culture. In the words of Senator Charles Sumner: "Give me the centralism of Liberty. Give me the imperialism of Equal Rights." CONG. GLOBE, 42d Cong., 1st Sess. 651 (1871).

If in the past geographical divisions of constitutional culture were particularly salient, last Term divisions of class seem to have assumed unusual prominence. Compare, e.g., Grutter v. Bollinger, 123 S. Ct. 2325, 2340 (2003) ("[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people . . . ."), id. at 2341 ("[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders."), and id. ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.")., with id. at 2350 (Thomas, J., concurring in part and dissenting in part) ("The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti.")., id. at 2355 (arguing that "there is nothing compelling about elite status"), id. at 2359 ("Apparently where the status quo being defended is that of the elite establishment . . . rather than a less fashionable Southern military institution, the Court will defer without serious inquiry . . . ."), and id. at 2362 n.11 ("[A]ll the Law School cares about is its own image among know-it-all elites . . . ."). See also Lawrence v. Texas, 123 S. Ct. 2472, 2496-97 (2003) (Scalia, J., dissenting) (criticizing the Court as "the product of a law-profession culture" characteristic of "a governing caste that knows best"); cf. Romer v. Evans, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins — and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. . . . [T]he law-school view of what 'prejudices' must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws . . . ." (citations omitted)).

One register of the shift from sectional to class differences is the fact that the geographical origins of the Justices, which used to be a matter of pressing political concern, are today a matter almost of indifference.

248 On the defeat of the ERA, see JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986). Much of the substance of the ERA, which provided that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972), has essentially been incorporated into the Court's contemporary equal protection doctrine. See Brannon P. Denning & John R. Vile, Necromancing the Equal Rights Amendment, 17 CONST. COMMENT. 593, 598 (2000) (referring to "judicial victories that seemed to render the ERA superfluous"); Joan A. Lukey & Jeffrey A. Smagula, Do We Still Need a Federal Equal Rights Amendment?, BOSTON B.J., Jan.-Feb. 2000, at 10, 10 (stating that the "new heightened intermediate scrutiny standard" for gender "indicates that the goals of the Equal Rights Amendment have survived and have been incorporated into judicial analysis of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution"). This history
culture is divided, a Court seeking to safeguard the values of constitutional culture must decide which version of constitutional culture it will support.\footnote{See Sarah Harding, Introduction: Law and Cultural Conflict, 78 CHI.-KENT L. REV. 479, 481 (2003) ("[N]eutrality is illusory. . . . In mediating between competing cultural perspectives, legal determinations are never without cultural meaning — there are always winners and losers on issues mediated through law and in the public realm.").} It must decide whether to side with the constitutional culture of the North or of the South; it must choose to support either those who promote or those who oppose traditional gender stereotypes.\footnote{When intervening in cultural controversies of this kind, the Court must gamble on the future development of the American constitutional order. The Court predicted correctly in both \textit{Brown} and \textit{Frontiero}, but it stumbled badly during the crisis of the New Deal, when it failed utterly to predict the actual evolution of the American polity.}

If the relationship between constitutional law and constitutional culture is modeled in this way, constitutional law can simultaneously reflect and regulate constitutional culture. When constitutional law intervenes in an ongoing cultural dispute about the meaning of the Constitution, it both draws strength from those who agree with the Court's vision of the Constitution and displaces the views of those who disagree with the Court's understanding. That is why even in the area of strict scrutiny, where constitutional law is most concerned to protect constitutional values from the encroachment of popular attitudes, constitutional law can without internal contradiction express values derived from constitutional culture and yet also seek to modify constitutional culture.

Seen from this angle, it is apparent that constitutional rights bear an exceedingly complex relationship to constitutional culture. We might imagine a spectrum in which, at one end, rational basis review allows constitutional law and constitutional culture freely to commingle, and in which, at the other end, strict scrutiny both reflects constitutional culture and authorizes constitutional law to reshape that culture.

The complexity of strict scrutiny was well illustrated last Term in the important case of \textit{Grutter v. Bollinger},\footnote{123 S. Ct. 2325 (2003).} in which Justice O'Connor authored an opinion for five Justices upholding the affirmative action program of the law school of the University of Michigan (Law School).\footnote{\textit{Id.} at 2347. Chief Justice Rehnquist and Justice Kennedy dissented from O'Connor's opinion on the ground that the Law School's affirmative action program was not narrowly tailored.} The program employed racial classifications, and O'Connor accordingly began her analysis by reiterating:
Because the Fourteenth Amendment "protect[s] persons, not groups," all "governmental action based on race — a group classification long recognized as in most circumstances irrelevant and therefore prohibited — should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."

To protect this constitutional value of equality of individual treatment, *Grutter* holds that racial classifications should be subject to "strict scrutiny," which "means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." The opinion explains that strict scrutiny is designed to facilitate "searching judicial inquiry" because race is an inherently "suspect classification."

See id. at 2365 (Rehnquist, C.J., dissenting). Justices Scalia and Thomas dissented on the ground "that racial classifications are per se harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications." *Id.* at 2361 (Thomas, J., concurring in part and dissenting in part).

*Grutter*, 123 S. Ct. at 2337 (alteration in original) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis in original) (citation and internal quotation marks omitted)).

*Grutter*, 123 S. Ct. at 2337 (quoting *Adarand*, 515 U.S. at 227). The implications of this point are controversial. See *id.* at 2348 n.* (Ginsburg, J., concurring) ("This case . . . does not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review."); *Gratz v. Bollinger*, 123 S. Ct. 2411, 2434 (2003) (Breyer, J., concurring in the judgment) ("I agree with Justice Ginsburg that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion . . . ." (citation omitted)); *id.* at 2444 (Ginsburg, J., dissenting) ("In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion . . . . Our jurisprudence ranks race a 'suspect' category, 'not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.'" (alteration in original) (citation omitted) (quoting *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931–32 (2d Cir. 1968) (footnote omitted)). O'Connor's opinion in *Grutter* seeks to blur this controversy. It states:

Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

*Grutter*, 123 S. Ct. at 2338 (citation omitted).

*Grutter*, 123 S. Ct. at 2337–38.

*Id.* at 2338 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

*Croson*, 488 U.S. at 500. It is odd, therefore, that at one point *Grutter* states "that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Grutter*, 123 S. Ct. at 2339 (quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 318–19 (1978) (opinion of Powell, J.)). It is not clear how a presumption of good faith is meant to cohere with the basic idea of strict scrutiny, which is designed aggressively to interrogate racial classifications because they are inherently "suspicious." See *John Hart Ely, Democracy and Distrust: A Theory of Judicial Review* 145–48 (1980) (arguing that the "compelling interest" and "narrowly tailored" prongs of strict scrutiny analysis should be understood as tools for "determining whether the initial suspicions aroused by the classification are well founded or rather on fuller exploration can be allayed"); see also *Grutter*, 123 S. Ct. at 2338 ("[S]trict scrutiny is designed to
It is no accident that strict scrutiny doctrine is framed in terms that are opaque to common usage. Whether a classification serves a "compelling" governmental interest or is "narrowly tailored" are questions that must be answered primarily by reference to the legal precedents of the Court. By deliberately formulating the question of constitutionality in this technical legal way, which is conspicuously impervious to the terms in which the debate over affirmative action is framed in constitutional culture, the Court facilitates its own control over the use of race by state actors. The Court can shape the intense controversies about affirmative action by manipulating the definition of a "compelling" state interest or by construing the meaning of "narrow tailoring."

It does not follow, however, that Grutter uses strict scrutiny to express values that are autonomous from contemporary constitutional culture. In fact quite the reverse is true, as evidenced by Grutter's interpretation of the "compelling interest" test. Grutter holds "that the Law School has a compelling interest in attaining a diverse student body," and it rests this conclusion on "our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission." Although Grutter does not offer a clear account of the Law School's "proper institutional mission," the Court appears to attribute to the Law School at least three distinct objectives:

1. The mission of the Law School is to provide an educational process that "promotes learning outcomes" by producing stu-

provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."

258 The Court can also shape such controversies by subtly shifting the criteria for determining which practices count as racial classifications that trigger strict scrutiny. Positive judgments about whether practices classify on the basis of race may frequently be driven by normative judgments about whether they have a legitimate and benign social purpose. See Balkin & Siegel, supra note 178, at 4 ("Courts must make a variety of implementing decisions in order to apply the anticlassification principle; and, as we show, they do not make such implementing decisions in any consistent manner. Inconsistency in the ways that courts have implemented the anticlassification principle, over time and in different parts of the law, suggests that the discourse of anticlassification conceals other values that do much of the work in determining which practices antidiscrimination law enjoins."); id. at 14-15 (comparing the ways in which equal protection doctrine defines what counts as a racial classification in the cases of criminal suspect descriptions and affirmative action).

259 Grutter, 123 S. Ct. at 2339.

260 Id.

261 The opinion veers instead into a recitation of the "benefits" of diversity. Id. at 2339-41.

262 Id. at 2340.
dents who are trained to function "as professionals." A diverse student body is essential to this mission because professionals must be prepared to work within "an increasingly diverse workforce," which requires that law school education facilitate "cross-racial understanding."

2. The mission of the Law School is to prepare "students for . . . citizenship" as part of its "fundamental role in maintaining the fabric of society." A diverse student body is indispensable to this mission because "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."

3. The mission of the Law School is to train "our Nation's leaders." A diverse student body is necessary to this mission because, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

Although Grutter casts itself as merely endorsing Justice Powell's opinion in Bakke, Grutter's analysis of diversity actually differs quite dramatically from Powell's. Powell conceptualized diversity as a

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263 Id. (quoting Brief of American Educational Research Ass'n et al. as Amici Curiae in support of Respondents, Grutter (No. 02-241), available in 2003 WL 398292, at *3).
264 Id.
265 Id. at 2339.
266 Id. at 2340.
267 Id. at 2340-41. The Court states:
   [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as amicus curiae, affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." . . . And, "[n]owhere is the importance of such openness more acute than in the context of higher education."

Id. at 2340 (alterations in original) (citations omitted) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter, available in 2003 WL 176635, at *13).

For an argument that affirmative action should be justified by the mission of American higher education to create a public culture capable of sustaining democratic legitimacy, see Robert Post, Introduction: After Bakke, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 13, 22-24 (Robert Post & Michael Rogin eds., 1998). It is a measure of Grutter's innovation that in 1998 it was "uncertain whether this justification for affirmative action, if candidly expressed, would pass constitutional muster." Id. at 24.

268 Grutter, 123 S. Ct. at 2341.
269 Id. The Court continues: "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." Id.

270 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269–324 (1978) (opinion of Powell, J); see also Grutter, 123 S. Ct. at 2337 ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").
value intrinsic to the educational process itself. He regarded diversity as essential to "the quality of higher education,"\textsuperscript{271} because education was a practice of enlightenment, "of 'speculation, experiment and creation'"\textsuperscript{272} that thrived on the "robust exchange of ideas"\textsuperscript{273} characteristically provoked by confrontation between persons of distinct life experiences.\textsuperscript{274} Powell understood diversity as necessary to facilitate this process of education. The state had a compelling interest in diversity insofar as it had a compelling interest in maintaining this educational process.\textsuperscript{275} But because most institutions in American life do not exist to promote this kind of education,\textsuperscript{276} Powell's explanation of the compelling interest of diversity did not reach very far beyond the specific context of higher education.

In contrast to Powell's opinion in \textit{Bakke}, \textit{Grutter} does not offer an account of the intrinsic value of the educational process. It instead conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership. It follows from this way of conceptualizing the problem that the Law School can have a compelling interest in using diversity to facilitate the attainment of these social goods \textit{only} if there is an independently compelling interest in the actual attainment of these goods. \textit{Grutter}'s justifications for diversity thus potentially reach far more widely than do Powell's.

This becomes clear if we examine \textit{Grutter}'s argument that diversity is a compelling interest because it is necessary for the Law School to fulfill its essential mission of providing the education necessary to "sustaining our political and cultural heritage."\textsuperscript{277} The State's interest in providing the education required to maintain "the fabric of society" can be no more compelling than the State's interest in actually pre-

\textsuperscript{271} \textit{Bakke}, 438 U.S. at 312–13.
\textsuperscript{272} \textit{Id.} (quoting \textit{Sweezy v. New Hampshire}, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment)).
\textsuperscript{273} \textit{Id.} (quoting \textit{Keyishan v. Board of Regents}, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).
\textsuperscript{274} \textit{Id.} at 312–13.
\textsuperscript{275} Powell explained:

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

\textit{Id.} at 313.
\textsuperscript{276} Some have argued that the broadcast media, like universities, also have this purpose. \textit{See}, \textit{e.g.}, \textit{Metro Broadcasting, Inc. v. FCC}, 497 U.S. 547, 567 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission.").
serving "our political and cultural heritage."  

And because Grutter affirms that "the civic life of our Nation" will lose legitimacy unless there is "[e]ffective participation by members of all racial and ethnic groups," an equally compelling interest exists in ensuring that members of all racial and ethnic groups actually participate in civic life. This implies that each American institution that serves as a forum for participation in civic life has a compelling interest in ensuring the participation of "all racial and ethnic groups."  

Similarly, if the Law School has a compelling interest in establishing a "training ground for a large number of our Nation's leaders," the state must have an equally compelling interest in maintaining the quality of its leadership. From a constitutional perspective, it is not enough that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity," but the nation must also possess "a set of leaders with legitimacy in the eyes of the citizenry." It is possible that such legitimacy can be assured merely by instilling confidence that all citizens, regardless of race or ethnicity, can become leaders. But it is also possible that such legitimacy requires that there be in addition some measure of actual diversity among American leaders. If that were true, then each American institution has a compelling interest in assembling a diverse and therefore legitimate set of leaders. If police are "leaders" in their communities, there is a compelling interest in ensuring diverse police departments; if doctors are leaders, there is a compelling interest in ensuring a diverse medical profession.

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278 Id.
279 Id.
280 Id.
281 Id. at 2341.
282 Id.
283 The argument with respect to the training of professionals has a potentially different form. Grutter does not explicitly assert that the legal profession must be diverse in order to fulfill its function. It argues instead that the Law School requires diversity in order to create the "cross-racial understanding" that will enable legal professionals to work effectively in an increasingly diverse workforce and marketplace. Id. at 2339. Ambiguity is created, however, when immediately after this argument Grutter observes:

What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps... is essential to the military's ability to fulfill its prin[c]ipal mission to provide national security."... At present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies."... To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting."... We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."
Whether the Court is actually ready to embrace the far-reaching implications of its own reasoning is quite uncertain. These implications are in serious tension not only with Grutter's deliberate assertion that "outright racial balancing" would be "patently unconstitutional," but also, as we shall see, with Grutter's exposition of the "narrowly tailored" prong of strict scrutiny. They are also seemingly inconsistent with O'Connor's past judgments, like her separate opinion in Wygant v. Jackson Board of Education concluding that a school board's desire to retain minority teachers in order to provide "role models" for its students does not constitute a compelling interest.

Id. at 2340 (alterations in original) (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, Grutter (No. 02-241), Gratz v. Bollinger, 123 S. Ct. 2411 (No. 02-516), available in 2003 WL 1787554, at *5, 27, 29). This passage seems to imply that if the military needs to be racially diverse in order to fulfill its principal mission, so also does the legal profession need to be racially diverse in order to fulfill its principal mission. If this were true, Grutter would establish that the need for diversity in the legal profession is a compelling interest.

Of course it is somewhat of a fiction to speak of the Court as though it possesses unified agency. It is evident that members of the Court differ widely among themselves on the constitutional issues raised by affirmative action, so that the Court's message on these issues will to some extent be divided and uncertain. This can be seen in the tension between Grutter and its companion case, Gratz v. Bollinger, 123 S. Ct. 2411 (2003), in which the Court struck down the undergraduate affirmative action program of the University of Michigan. Gratz and Grutter offer seemingly inconsistent accounts of the nature of strict scrutiny. Grutter states:

Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

Grutter, 123 S. Ct. at 2338. In Gratz, however, the Court appears to suggest that strict scrutiny is always the same regardless of context:

It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." . . . This "standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification."

Gratz, 123 S. Ct. at 2427 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995); and Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion)) (internal quotation marks omitted). This difference is so stark that Breyer, who joins Grutter, and who agrees with the Court's judgment in Gratz, refuses to join the latter opinion, writing separately to note that "I agree with Justice [Ginsburg's dissent] that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, . . . for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally." Id. at 2334 (Breyer, J., concurring in the judgment). For a discussion of strict scrutiny, see supra note 254.

Grutter, 123 S. Ct. at 2339.

476 U.S. 267, 284 (1986).

Id. at 288 n.*. The "role model" rationale is quite close to Grutter's argument that the state has a compelling interest in maintaining "a set of leaders with legitimacy in the eyes of the citizenry." Grutter, 123 S. Ct. at 2341. If teachers are "leaders" to their students, and if leadership must be diverse in order to retain legitimacy, then the reasoning of Grutter appears to suggest that there is a compelling interest in a school board's retaining a diverse faculty. O'Connor's opinion is also in tension with other past opinions. See, e.g., Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting) (criticizing the Court for "too casually extend[ing] the
Grutter was so dramatic in part because of the striking and unexpected disparity between the generosity of its exposition of the compelling interest standard and the Court's previous hostility to affirmative action, as evidenced in such past decisions as Adarand Constructors, Inc. v. Pena and Richmond v. J.A. Croson.

We may ask, therefore, how the Court came to embrace this particular explanation of the interests served by affirmative action. Although Powell's exposition of the compelling educational interest of diversity had been intellectually elegant and precise, it had displayed little or no relationship to the actual reasons why affirmative action had become prominent in American higher education. These reasons were based almost entirely on the felt need to remedy deep social dislocations associated with race. Grutter, by contrast, far more accu-
rately identifies these reasons. In the years since Bakke, elite universities have become ever more committed to the goal of achieving a racially diverse student body. 291 Although they tend to justify this commitment in terms of the educational benefits articulated by Powell, 292 "diversity" nevertheless still chiefly functions as "a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment." 293

This case concerns access of minorities to professional education and careers, specifically in medicine. The experience of the professional schools in the 1960's mirrored the picture elsewhere. The falling of formal racial barriers failed to lead to participation by significant numbers of minorities. All but two medical schools in the nation remained virtually all-white islands in a multiracial society. Indeed, in terms of the numbers of minorities entering medical schools, a threat of retrogression appeared.

Id. at 8-10; see also McGeorge Bundy, The Issue Before the Court: Who Gets Ahead in America?, THE ATLANTIC, Nov. 1977, at 41, 42 ("[T]he deepest and most general objective [of affirmative action] has been to ensure full and fair access to all parts of our social, economic, and professional life for nonwhite Americans.... [T]here can be no blinking the enormous and unique set of handicaps which our whole history, right up to the present, has imposed on those who are not white."); Jerome Karabel, The Rise and Fall of Affirmative Action at the University of California, J. BLACKS IN HIGHER EDUC., Autumn 1999, at 109, 110 (arguing that the timing of the introduction of affirmative action at the University of California "suggests that it was less the moral claims of the civil rights movement than the palpable threat to the existing order posed by the urban (and, to a lesser extent, the campus) uprisings of the late 1960s that led to a rupture in long-standing patterns of racial and ethnic exclusion not only at the University of California but at colleges and universities throughout the country").

291 See Grutter, 123 S. Ct. at 2329 (noting that “[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views" concerning permissible race-conscious policies); Samuel Issacharoff, Can Affirmative Action Be Defended?, 59 OHIO ST. L.J. 669, 679 (1998); Lawrence H. Summers & Laurence H. Tribe, Race Is Never Neutral, N.Y. TIMES, Mar. 29, 2003, at A11 ("There is a broad consensus supporting the value of racial diversity at our nation’s universities [and affirmative action] is by now deeply woven into the fabric of our society."); cf. Jeffrey Rosen, How I Learned to Love Quotas, N.Y. TIMES, June 1, 2003, § 6 (Magazine), at 52 ("In both California and Texas, the political pressures to achieve racial diversity proved so overwhelming that when each state’s universities were forbidden to take race into account in the admissions process, they simply refused to accept the decline in black and Hispanic enrollment that inevitably followed.").

292 Deborah Malamud writes:

As a rationale for affirmative action, diversity... has become a popular alternative to the remediation of socioeconomic disadvantage, for three reasons. The first reason is that the Supreme Court rejects ‘societal discrimination’ as a constitutional rationale for affirmative action but has accepted the rationale of diversity when that issue has come before it. The second reason is that the diversity rationale solves the (perceived) problem of affirmative action for the black middle class.... The third reason... is that the goals of diversity and inclusion resonate with those of integration... and, as embattled in daily practice as it is, integration still carries a legitimacy that the concept of preferences does not.


293 Sanford Levinson, Diversity, 2 U. PA. J. CONST. L. 573, 601 (2000) (quoting Jack Balkin, Professor of Law, Yale Law School); see also Randall Kennedy, Affirmative Reaction: The Courts, the Right and the Race Question, 14 AM. PROSPECT 3, Mar. 2003, at A9, A11; Peter H. Schuck, Affirmative Action Is Poor Public Policy, 34 CHRON. HIGHER EDUC. 49, May 2, 2003, at B10, B11 ("In truth, plans like Michigan’s are not really about diversity, but are instead crude efforts to
Grutter endorses the practice of affirmative action for university admissions in terms that closely correspond to the reasons that actually sustain the practice. Grutter draws its analysis of the "compelling interest" prong of strict scrutiny not from the text of the Fourteenth Amendment, nor from the intentions of the Framers of the Fourteenth Amendment, but from the values and beliefs of elite universities. The opinion is quite explicit about this. Grutter states that it will "defer" to the "Law School's educational judgment that such diversity is essential to its educational mission" and that it will presume "'good faith' on the part of a university . . . absent 'a showing to the contrary.' Just so that no one would miss the point, the Court candidly supports its analysis by referring to the judgment of professional educators that "diversity promotes learning outcomes," to the judgment of "major American businesses . . . that the skills needed in today's increasingly global marketplace can only be developed through remedy the continuing social disadvantages suffered by black people, with certain other favored groups thrown in.").

Despite their belief in the autonomy of constitutional law, neither Scalia nor Thomas cites the text of the Fourteenth Amendment or the original intent of its Framers in defense of their view that racial classifications are virtually per se illegal. See Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753 (1985) (discussing the compatibility of affirmative action with the original intent of the Framers of the Fourteenth Amendment); see also supra note 252. To the contrary, Scalia has candidly acknowledged:

I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (alteration in original) (emphasis added) (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975)). It is clear, therefore, that when Scalia and Thomas argue that "every time the government . . . makes race relevant to the provision of burdens or benefits, it demeanes us all," Grutter, 123 S. Ct. at 2352 (Thomas, J., concurring in part and dissenting in part), they are themselves also expressing a value that is ultimately derived from constitutional culture. The division within the Court is thus not between those who embrace and those who reject the autonomy of constitutional law, but instead between those who side with one position in the contemporary debate about affirmative action and those who side with a different position.

Grutter, 123 S. Ct. at 2330.


Grutter, 123 S. Ct. at 2340 (citing Brief of American Educational Research Ass'n et al. as Amici Curiae in support of Respondents, Grutter (No. 02-241), available in 2003 WL 398292, at *3); WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); COMPPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (Mitchell J. Chang et al. eds., 2003); and DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michal Kurlaender eds., 2001)).
exposure to widely diverse people, cultures, ideas, and viewpoints”;
and to the judgment of “high-ranking retired officers and civilian leaders of the United States military” that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security.”

There is no doubt that Grutter interprets the Constitution in light of the beliefs of those whom Justice Thomas in dissent disparagingly calls “the cognoscenti.”

This does not imply, however, that Grutter is merely a passive reproduction of elite views. To the contrary, the Court very much has its own ideas of the constitutional values at stake in affirmative action, and it is determined to craft legal doctrine to define and protect these values. The Court makes this clear in its interpretation of the “nar-

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298 Id. (citing Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, Grutter (No. 02-241), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516), available in 2003 WL 399056, at *5; and Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, Grutter (No. 02-241), Gratz (No. 02-516), available in 2003 WL 39906, at *3-4).
300 Id. at 2350 (Thomas, J., concurring in part and dissenting in part); see also Brief of Harvard University et al. as Amici Curiae Supporting Respondents, Grutter (No. 02-241), Gratz (No. 02-516), available in 2003 WL 399220, at *3 (“Every major profession in America has made known a desire for diversity within its ranks. Businesses demand that the graduates of highly selective universities both be diverse and be prepared to work with colleagues from different backgrounds.”). There is a fascinating and sharp exchange on this point between Chief Justice Rehnquist and Justice Ginsburg in Gratz, the companion case to Grutter in which the Court struck down the affirmative action program for undergraduates of the University of Michigan on the ground that it was not narrowly tailored. In dissent, Justice Ginsburg argues that because “one can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue,” the Court ought to interpret the narrow tailoring requirement to encourage the greatest degree of transparency, rather than a “resort to camouflage.” Id. at 2446 (Ginsburg, J., dissenting). In his opinion for the Court, Rehnquist labels Ginsburg’s arguments “remarkable for two reasons”:

First, they suggest that universities — to whose academic judgment we are told in Grutter v. Bollinger . . . we should defer — will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

Gratz, 123 S. Ct. at 2430 n.22. Ginsburg defends herself from Rehnquist’s challenge by arguing: Contrary to the Court’s contention, I do not suggest “changing the Constitution so that it conforms to the conduct of the universities.” . . . In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. . . . Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.

Id. at 2446 n.11 (Ginsburg, J., dissenting). Notably, neither Rehnquist nor Ginsburg is willing to endorse the candid way in which the Court in Grutter fashions constitutional law on the basis of its incorporation of constitutional culture. Both maintain the fiction that the conduct of universities is categorically irrelevant to the construction of constitutional law.
narrowly tailored” prong of the strict scrutiny test, which the Court holds has four components.\(^{301}\) A race-based affirmative action program (1) must “not unduly harm members of any racial group”\(^{302}\) (2) can be implemented only if there has been a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks”;\(^{303}\) (3) “must be limited in time”;\(^{304}\) and (4) must afford each applicant “truly individualized consideration.”\(^{305}\)

There is much to be said about each of these components,\(^{306}\) but I shall focus on the last, which is unquestionably the most important.

\(^{301}\) The Court explains that “[t]he purpose of the narrow tailoring requirement is to ensure that ‘the means chosen “fit” . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” ‘Grutter, 123 S. Ct. at 2341 (omission and second alteration in original) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

\(^{302}\) Id. at 2345.

\(^{303}\) Id. (citing Croson, 488 U.S. at 507).

\(^{304}\) Id. at 2346.

\(^{305}\) Id. at 2342.

\(^{306}\) The Court holds that the first component is satisfied by the individualized consideration requirement of the fourth component. Id. at 2345-46 (quoting Regents of University of California v. Bakke, 438 U.S. 265, 318 (1978) (opinion of Powell, J.)). It gives short shrift to the second component. See id. at 2344 (“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” (citing Croson, 488 U.S. at 509-10; and Wygant v. Jackson Board of Education, 476 U.S. 267, 280 n.6 (1986))). And it reasons that the third component is necessary because: [R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.

Id. at 2346. This reasoning, however, is faulty. It establishes only that race-based affirmative action programs should be limited in time if such limitations correspond to “the interest[s]” served by the program.

The requirement that affirmative action programs be limited in time originated in the context of programs that purported to serve remedial interests. In the famous formulation of Justice Blackmun, “[i]n order to get beyond racism, we must first take account of race. There is no other way.” Bakke, 438 U.S. at 407 (opinion of Blackmun, J.). The very telos of a remedial program, which is to “get beyond racism,” defines a time horizon for the justification of the program. Various Justices, however, including Justice Powell, became suspicious that purported remedies, “timeless in their ability to affect the future,” Wygant, 476 U.S. at 276, were in fact covert substantive entitlements that distributed goods based upon race. See Croson, 488 U.S. at 510-11 (opinion of O’Connor, J.). Time limitations were one way to ensure that an affirmative action program was truly remedial.

It is striking, therefore, that Powell’s opinion in Bakke does not impose any time limitations on affirmative action programs designed to achieve diversity. This is because the justification of diversity, unlike remedy, has no built-in time horizon; if diversity is necessary for the quality of education, it is necessary at any and all times. See Post, supra note 267, at 19-20. The justifications for diversity offered by Grutter are also time-insensitive. If diversity is necessary in order to train competent professionals, for example, it is necessary at any and all times; there is no intrinsic time horizon when this need for diversity will disappear. The time-limitation requirement announced by Grutter, therefore, makes theoretical sense only if the justifications for diversity that it announces are taken to be quasi-remedial.
The requirement of individualized consideration originated in Powell's opinion in \(\text{Bakke}\), where the requirement followed more or less directly from Powell's account of why diversity was a compelling interest.\(^{307}\) If education works best when students are forced to engage with persons who are different from them, and if diversity is necessary to facilitate such engagement, then race is both a relevant dimension of diversity and only one of a potentially infinite number of such dimensions.\(^{308}\) Powell concluded that a constitutional affirmative action program would accordingly acknowledge the importance of race as an element of diversity, but only in the context of considering all the many different dimensions of diversity that might characterize any single candidate.\(^{309}\) Powell developed the individualized consideration

\[\text{It is not clear, however, what that might mean. My best guess is that \text{Grutter}'s requirement that affirmative action programs be temporary — although logically disconnected from, and perhaps even inconsistent with, the compelling interests served by such programs — should be understood in the context of an implicit conversation between the Court and the American public, which remains committed to affirmative action programs primarily for remedial reasons. See supra pp. 63–64. The requirement is thus yet another sign of how \text{Grutter} fashions its doctrine both on the basis of, and in response to, constitutional culture.}\]

The implicit logic of remedy actually pervades much of the rhetoric of \text{Grutter}. In its discussion of the necessity of time limitations, for example, the opinion quotes an article by Nathaniel L. Nathanson and Casimir J. Bartnik to the effect that "the acid test" of "programs of preferential treatment" is "their efficacy in eliminating the need for any racial or ethnic preferences at all." \text{Grutter, 123 S. Ct. at 2346} (quoting Nathaniel L. Nathanson & Casimir J. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, CHI. B. REC., May–June 1977, at 282, 293). Although this point resonates with latent remedial elements in the Court's opinion, it seems perfectly irrelevant to the explicit reasoning of \text{Grutter}, which logically implies that the "acid test" for the Law School's affirmative action program should instead be the creation of competent professionals, informed and participatory citizens, and legitimate national leaders. These contradictory impulses account for the strangely uncertain air of the Court's conclusion, which sounds more like a pious wish than a conclusion of law derived from the legal premises of its opinion: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." \text{Id. at 2347}.

\[\text{307 See Bakke, 438 U.S. at 315–18 (opinion of Powell, J.).}\]
\[\text{308 See id. at 314 ("Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.").}\]
\[\text{309 The kind of affirmative action program approved by Powell would deem "race or ethnic background" a ""plus' in a particular applicant's file." Id. at 317. Race would "not insulate the individual from comparison with all other candidates for the available seats." Id. Powell explained:}\]

\[\text{The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary}\]
requirement in order to police the distinction between an affirmative action program in which race was a legitimate (but not predominant) element of difference, and an affirmative action program that was sliding toward "the functional equivalent of a quota system."\(^{310}\)

*Grutter* borrows "the requirement of individualized consideration"\(^{311}\) directly from Powell's opinion in *Bakke*. It makes no independent effort to explain or justify the requirement.\(^{312}\) Instead, it simply decrees:

[A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.\(^{313}\)

Because *Grutter* does not embrace Powell's account of the importance of educational diversity, however, the Court's imposition of the individualized consideration requirement cannot be justified by its explanation of the compelling interest standard.

In fact *Grutter's* explication of the compelling interest standard seems to point in the opposite direction from an individualized consideration requirement. It would be most natural to conclude that a law school interested in attaining the degree of racial diversity necessary to ensure that "participation . . . in the civic life of our Nation" include

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\(^{310}\) *Id.* at 317-18. Thus Powell argued that even if "the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body," any such program would "misconceive[ ] the nature of the state interest that would justify consideration of race or ethnic background." *Id.* He also noted:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

\(^{311}\) *Grutter*, 123 S. Ct. at 2343.

\(^{312}\) *See id.* at 2342-45.

\(^{313}\) *Id.* at 2343 (citing *Bakke*, 438 U.S. at 318 (opinion of Powell, J.)).
members of all racial and ethnic groups," or to ensure that our leadership is "inclusive of talented and qualified individuals of every race and ethnicity," or to ensure that its students are better prepared "for an increasingly diverse workforce and society," should precisely and decisively focus on race to the extent necessary to achieve these objectives. The account of diversity embraced by Grutter does not conceive of race as simply one element in a potentially infinite universe of differences. It instead points to the particular and unique value of racial diversity.

The Court is nevertheless quite serious about using the "narrowly tailored" prong of strict scrutiny to distinguish affirmative action programs that evaluate "each applicant ... as an individual" from those programs that make "an applicant's race or ethnicity the defining feature of his or her application." That is the lesson of Gratz v. Bollinger, the companion case of Grutter, in which the Court used the individualized consideration requirement to strike down the Michigan undergraduate affirmative action program, which awarded "20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."

Gratz offers two distinct accounts of the individualized consideration requirement. It states, on the one hand, that the requirement is inconsistent with any program in which "any single characteristic automatically ensure[s] a specific and identifiable contribution to a university's diversity." But it also notes, on the other hand, that the Michigan undergraduate affirmative action program is unconstitutional because the "automatic distribution of 20 points has the effect of making 'the factor of race ... decisive' for virtually every minimally qualified underrepresented minority applicant." The upshot is that the Court never makes clear whether the Michigan undergraduate

314 Id. at 2340.
315 Id. at 2341.
316 Id. at 2340 (quoting Brief of American Educational Research Ass'n et al. as Amici Curiae in support of Respondents, Grutter (No. 02-241), available in 2003 WL 398292, at *3).
317 Id. at 2343. Paradigmatic of prohibited programs are those that create "'quota[s]' ... in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" Id. at 2342 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989)).
318 123 S. Ct. 2411 (2003). Chief Justice Rehnquist authored the Court's opinion in Gratz, which was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Breyer joined the Court's judgment. Justice Stevens, joined by Justice Souter, dissented on grounds of standing, and Justice Ginsburg, joined by Justice Souter and in part by Justice Breyer, dissented on the merits.
319 Id. at 2427.
320 Id. at 2428.
program fails the individualized consideration requirement because it quantifies the contribution of race to diversity by “a specific and identifiable” measure, or instead because the program employs a measure that is “decisive.”

Although *Gratz* leaves the precise meaning of the individualized consideration requirement ambiguous, it nevertheless sends an unmistakable message to universities that the Court is prepared to use the “narrowly tailored” prong closely to supervise affirmative action programs. Because the requirement that such programs treat “each applicant . . . as an individual” does not follow from the Court’s exposition of the compelling interest standard, it must instead have a different theoretical foundation. The most likely candidate is the Court’s understanding of the primary legal value protected by the Equal Protection Clause: “Because the Fourteenth Amendment ‘protect[s] persons, not groups,’ all ‘governmental action based on race — a group classification long recognized as in most circumstances irrelevant and therefore prohibited — should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”

*Grutter* evidently demands individualized consideration because it reads the Equal Protection Clause as establishing a legal right to be treated as an individual, rather than as a member of a racial group.

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322 Justice O’Connor, the only member of the Court to join the Court’s opinion in both *Grutter* and *Gratz*, wrote separately in *Gratz* to explain her position. Her analysis, however, is similarly ambiguous. At one point she observes that the constitutional vice of the undergraduate program is that it employs a specific and identifiable measure:

[T]he selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school’s admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class.

*Id.* at 2432 (O’Connor, J., concurring). At another point, however, O’Connor seems to emphasize the decisive nature of the point system:

> The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court’s opinion in *Grutter* requires: consideration of each applicant’s individualized qualifications, including the contribution each individual’s race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups.

*Id.* at 2431 (third emphasis added) (citations omitted).

How <i>Grutter</i> expects the individualized consideration requirement to protect this legal value is a genuinely puzzling question. <i>Grutter</i> explicitly and repeatedly announces that universities can use affirmative action programs to assemble "a critical mass of underrepresented minority students," which is defined as the number of minority students necessary to achieve "the educational benefits that diversity is designed to produce." Universities must thus be free to regard race as an especially salient dimension of diversity, but this seems inconsistent with the constitutional requirement that they treat applicants as unique persons rather than as members of racial groups. It is not clear how universities can, on the one hand, create a "critical mass" of minority students, and, on the other hand, refuse to treat "an applicant's race or ethnicity [as] the defining feature of his or her application." It does not seem that universities can assemble a critical mass of minority students unless race is the defining factor in a student's application, even if it is "decisive" only at the margins.

324 Id. at 2343.
325 Id. at 2339. The Court appears to defer to the Law School's "experiences and expertise" concerning the need for a "critical mass." Id. at 2341 ("The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.").
326 Justice Powell, of course, faced the same paradox, and, like the Court in <i>Grutter</i>, he explicitly permitted universities to design their affirmative action programs with "some attention" to the number of minority students they admitted. <i>Bakke</i>, 438 U.S. at 323. Although this concession was inconsistent with Powell's account of diversity, see id. at 317-18, it did allow him to approve affirmative action programs as they actually existed in most American universities.
327 <i>Grutter</i>, 123 S. Ct. at 2343.
328 See supra p. 70. It is noteworthy that in <i>Grutter</i> Chief Justice Rehnquist does not dissent on the ground that the goal of attaining a "critical mass" was inconsistent with the requirement of individualized consideration. He instead dissents on the ground that the Law School's "alleged goal of 'critical mass' [was] simply a sham." <i>Grutter</i>, 123 S. Ct. at 2367 (Rehnquist, C.J., dissenting). Rehnquist argues:

[T]he ostensibly flexible nature of the Law School's admissions program that the Court finds appealing... appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional."

Id. at 2369 (quoting <i>Grutter</i>, 123 S. Ct. at 2339); see also id. at 2348 (Scalia, J., concurring in part and dissenting in part) ("[T]he University of Michigan Law School's mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions."); id. at 2371 (Kennedy, J., dissenting) ("[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, 'patently unconstitutional.'") (quoting <i>Grutter</i>, 123 S. Ct. at 2339)).
This suggests that the individualized consideration requirement is compatible with race being a decisive criterion so long as the use of race in an affirmative action program is narrowly tailored to function as a decisive criterion for the achievement of a constitutionally legitimate purpose, like attaining a critical mass of minority students.\textsuperscript{329} If we ask, then, why \textit{Gratz} struck down Michigan’s undergraduate affirmative action program, it must be because the program accorded to race the “specific and identifiable”\textsuperscript{330} value of twenty points. But because the Court approves the Law School’s program, which assigns race the specific value necessary to achieve a critical mass of minority students, the fundamental defect of Michigan’s undergraduate program must be that this value is made “identifiable.”\textsuperscript{331} This implies that if the undergraduate program and the Law School each assign the same “specific” value to race — the value necessary to assemble a critical mass of minority students — and if the undergraduate program does so explicitly and the Law School implicitly, the former is unconstitutional, but not necessarily the latter.\textsuperscript{332}

The Court responds to Rehnquist’s dissent by noting that even though the Law School may admit minority students in proportion to their representation in the applicant pool, nevertheless, “as [the Chief Justice] concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year.” \textit{Grutter}, 123 S. Ct. at 2343. Because the Court’s response does not meet the force of Rehnquist’s objection, it clearly signals that the Court is prepared to tolerate quite “decisive” considerations of race, so long as the visible manifestation of these considerations — the number of minority students who actually enroll in a school — does not convey the message that a school seeks to attain proportional representation for minority students. On the importance of such appearances for the reasoning of \textit{Gratz} and \textit{Grutter}, see infra pp. 74–75.

\textsuperscript{329} See supra note 328. Whether race is a decisive criterion for the purpose of attaining a critical mass is a different question from whether race is “a decisive factor” for the purpose, say, of achieving proportional representation. \textit{See} \textit{Gratz} v. Bollinger, 123 S. Ct. 2411, 2441 (Souter, J., dissenting).

\textsuperscript{330} \textit{Gratz}, 123 S. Ct. at 2428.

\textsuperscript{331} \textit{Id.} In his \textit{Gratz} dissent, Justice Souter notes the inevitable necessity that an affirmative action program assign some specific value to race:

The very nature of a college’s permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants’ chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell’s plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its “holistic review”; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in \textit{Bakke}.

\textit{Id.} at 2441 (Souter, J., dissenting) (citation omitted) (quoting \textit{Grutter}, 123 S. Ct. at 2343).

\textsuperscript{332} In her separate concurring opinion in \textit{Gratz}, Justice O’Connor appears to offer yet a third reason why Michigan’s undergraduate program fails the individualized consideration require-
Why might the explicit, identifiable way in which the undergraduate program specifies the value of race fail the "narrowly tailored" prong of strict scrutiny? My best guess is that the twenty-point bonus sends a message to applicants and to the world that being a member of a racial group is worth a certain, named amount, and it therefore invites members of that group to feel entitled to that amount. "In such circumstances, the fear of racial 'balkanization' is most pronounced." The potential for balkanization is muted within the Law School program, however, because the value assigned to race is camouflaged by an opaque process of implicit comparisons. Although transparency is ordinarily prized in the law, the Court in Grutter and Gratz constructs doctrine that in effect demands obscurity.

The Court understands that "[b]y virtue of our Nation's struggle with racial inequality" there are powerful social reasons for using affirmative action programs to address the social dislocations of race. Yet the Court is also terrified that the growth of racial entitlements...
might lead "America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life." It therefore interprets strict scrutiny so as to minimize the likelihood of racial balkanization by requiring affirmative action programs to accord symbolic priority to individuals, as distinct from racial groups, through the ideological assertion that each candidate is receiving "individualized consideration." Even as it authorizes universities to establish affirmative action plans that produce a critical mass of minority students, the Court prohibits these plans from utilizing procedures or rules that symbolically convey the message that applicants are entitled to educational benefits by virtue of their membership in a racial group. Here, as in other areas of equal protection law, "appearances do matter." Racial inequalities can be addressed, but only in ways that efface the social salience of racial differences.


Powell was also sensitive to appearances in Bakke. The affirmative action program of the UC Davis medical school at issue in the case explicitly set aside sixteen places for minority students out of a class of one hundred. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 279 (1978) (opinion of Powell, J.). Powell observed that in contrast to the kind of affirmative action program that he would approve, which would give each applicant individualized consideration but which would also pay "some attention" to the numbers of minorities admitted, see supra note 326, the Davis program revealed a "facial intent to discriminate." Bakke, 438 U.S. at 318. No such "facial infirmity" would exist, Powell argued, in "an admissions program where race or ethnic background is simply one element — to be weighed fairly against other elements — in the selection process." *Id.* Powell's focus on "facial" appearances is striking because by hypothesis an intent to discriminate — to produce a certain number of minority students — would be present in either kind of affirmative action program. The dissenting Justices in Bakke thus observed:

There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.

*Id.* at 378 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part). The constitutional distinction Powell sought to establish, however, was apparently that between affirmative action programs that did and did not create the ideological appearance of individualized consideration.
It is plain, then, that the content of the constitutional law announced by *Grutter* and *Gratz* makes sense almost entirely within the context of a dialogue with the constitutional culture of the nation. The Court is willing to interpret the Equal Protection Clause in light of the constitutional convictions of those who believe that affirmative action in higher education is necessary to redress continuing racial dislocations. But the Court reserves authority to modify and regulate these convictions to protect its own legal sense of the constitutional right to be treated as an individual rather than as a member of a racial group. The Court thus forces all affirmative action programs to minimize the divergence between affirmative action and the ideal of individualized consideration. As a result, the Court not only maintains a rough balance between constitutional law and constitutional culture, but it also intervenes into a fierce controversy within constitutional culture about the legitimacy of affirmative action in a way that recognizes and legitimates concerns on both sides of the dispute.\(^\text{339}\)

The Court engages in this dialogue in the heart of strict scrutiny, at the core of its essential mission of protecting individual rights. Even in this most sacred domain, the Court plainly views constitutional culture as a legitimate and necessary source for the creation of constitutional law, both in the sense that the beliefs and convictions of that culture importantly shape the content of the Court’s understanding of the equal protection principle, and in the sense that the Court crafts its legal doctrine in ways specifically designed to engage and influence those beliefs and convictions.\(^\text{340}\) In *Grutter* and *Gratz*, we see before our eyes the mysterious alchemy by which the historical dynamics of constitutional culture are transformed from merely external constraints on the legal judgments of the Court into the internal material of constitutional law itself.

This suggests that constitutional culture is neither purely external to constitutional law nor purely internal to it. Constitutional law should instead be understood as continuously engaged with constitutional culture. Constitutional law draws inspiration, strength, and legitimacy from constitutional culture, which endows constitutional law with orientation and purpose. There can be no constitutional law without constitutional culture, but neither can constitutional law be

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339 See, e.g., Statement on the Supreme Court Decision on the Michigan Affirmative Action Cases, 39 WEEKLY COMP. PRES. DOC. 803 (June 23, 2003) ("I applaud the Supreme Court for recognizing the value of diversity on our Nation’s campuses. ... Today’s decisions seek a careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law." (statement of President George W. Bush)).

reduced to constitutional culture. This dialectical relationship is as true from the external perspective of a historian charting the development of constitutional law as it is from the internal perspective of a judge seeking to make constitutional law. For both judges and historians, constitutional culture is the medium within which constitutional law is fashioned.

III.

In Part II we considered the relationship of constitutional law to constitutional culture, to the beliefs that nonjudicial actors hold about the meaning of the Constitution. If we now widen our lens and consider the relationship of constitutional law to culture more generally, to the beliefs and values of nonjudicial actors, we can see that the conclusions of Part II are simply a specific instance of a more general truth: law is both a cultural product and a vehicle for the regulation and discipline of culture.

If we conceptualize culture as including the full repertoire of a society's norms and meanings, it is difficult to imagine how a court could ever decide a case without relying upon cultural ideas and constructs. Whether a court is to determine "the fairness" of extending the statute of limitations for a crime after the prior statute of limitations has expired,\textsuperscript{341} or ascertain the various messages "conveyed" by the burning of a cross,\textsuperscript{342} or decide whether "police conduct" has communicated "to a reasonable person that he [is] not at liberty to ignore the police presence and go about his business,"\textsuperscript{343} or decide whether punitive damages are "both reasonable and proportionate to the amount of harm,"\textsuperscript{344} or inquire whether police "methods . . . are 'so brutal and so offensive to human dignity' that they 'shock[] the conscience,'"\textsuperscript{345} a court must deliberate and judge within the categories of cultural meaning that it shares with society at large. No other alternative seems possible or desirable. Just as an American court must conceive and convey its opinions within the medium of the English language, so it must conceive and convey its judgments within the web of cultural understandings that it shares with the society that it serves.\textsuperscript{346}

\begin{enumerate}
\item Stogner v. California, 123 S. Ct. 2446, 2455 (2003).
\item Virginia v. Black, 123 S. Ct. 1536, 1546 (2003).
\item Of course courts deploy these cultural understandings in ways designed to serve the pragmatic horizon of the law, which means that their interpretations of these understandings are always shaped by the specific needs and purposes of the legal system. Cultural meaning is for this reason never translated transparently into legal doctrine, but rather is always rendered into forms
\end{enumerate}
Consider, for example, the Court's decision last Term in *United States v. American Library Ass'n (ALA)*, in which the Court considered the constitutionality of the Children's Internet Protection Act (CIPA). CIPA provides that libraries can receive federal funds to offset the costs of accessing the Internet only if they install "software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." As Chief Justice Rehnquist's plurality opinion frames the issue, Congress can attach conditions to federal funding to induce behavior it deems desirable, but not to induce behavior that is unconstitutional. The question, therefore, is whether libraries would violate the First Amendment were they to install filters preventing patrons from accessing Internet sites that are obscene or that contain material that is harmful to minors.

The answer to this question, Rehnquist argues, depends upon "the role of libraries in our society." Rehnquist concludes that because the "traditional" mission of a library is "to provide materials 'that would be of the greatest direct benefit or interest to the commu-
nity,"\textsuperscript{354} and because the fulfillment of this mission requires "broad discretion to make content-based judgments in deciding what private speech to make available to the public,"\textsuperscript{355} libraries would not violate the First Amendment if they were to exercise this same discretion to filter access to Internet sites:

A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.\textsuperscript{356}

Justice Souter disagrees. He does not regard the use of Internet filters as involving the kind of discretion that libraries exercise when they decide to acquire materials for their collections. Souter argues that the imposition of Internet filters should instead be compared to a library exercising discretion to deny patrons access to existing collections.\textsuperscript{357} On that question, Souter observes, the "[i]nstitutional history of public libraries in America discloses an evolution toward a general rule, now firmly rooted, that any adult entitled to use the library has access to any of its holdings."\textsuperscript{358} This "understanding that a librarian's job was to guarantee that 'all people had access to all ideas'"\textsuperscript{359} "be-speaks an American public library that gives any adult patron any material at hand, and a history without support for the plurality's reading of the First Amendment as tolerating a public library's censorship of its collection against adult enquiry."\textsuperscript{360}

I reproduce this debate to emphasize the obvious point that it does not turn on the text of the First Amendment, or on the intentions of the Framers, or on the constitutional beliefs of nonjudicial actors, or even on the interpretation of legal materials. Instead it concerns how the cultural practice of librarianship is to be understood, and also how the new technology of Internet filters should be regarded. Rehnquist and Souter seem to agree that if libraries are institutions that routinely

\textsuperscript{354} Id. at 2304 (quoting American Library Ass'n v. United States, 201 F. Supp. 2d 401, 421 (E.D. Pa. 2002)).

\textsuperscript{355} Id.

\textsuperscript{356} Id. at 2306.

\textsuperscript{357} Id. at 2321 (Souter, J., dissenting) ("[T]he choice to block is a choice to limit access that has already been acquired.").

\textsuperscript{358} Id. at 2322. "That is," Souter continues, "libraries do not refuse materials to adult patrons on account of their content." Id. at 2322 n.4.

\textsuperscript{359} Id. at 2322 (quoting EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876–1939, at 156 (1984)).

\textsuperscript{360} Id. at 2323–24.
exercise content-based discretion in deciding what material to make available to their patrons, CIPA does not violate the First Amendment. But if libraries follow a norm of providing material to patrons without exercising such discretion, at least in circumstances that are relevantly analogous to the installation of Internet filters, there is a strong argument that CIPA is unconstitutional. Resolving the constitutional inquiry depends upon how the Court characterizes the social meaning of libraries and Internet filters.

Constitutional law typically depends upon such cultural judgments. This is because constitutional law seeks to protect constitutional values, and the fulfillment of these values depends upon the social landscape in which they are to be realized. Whether or not a library violates the First Amendment by selectively withholding material from its patrons depends, in the first instance, on what a library is and how it is understood to function. CIPA would endanger constitutional values if ordinary Americans regarded libraries as a resource that was routinely available to be used at their discretion, like the mail. But the constitutional picture would look quite different if Americans believed that patrons could not access library collections without the prior and discretionary approval of librarians. In that case, CIPA would seem simply to reinforce existing social practices. In ALA, therefore, the fulfillment of the constitutional value of freedom of speech does not turn on legal material alone, but also on cultural meanings that the Court can discern only by drawing upon its knowledge as a literate participant in American culture.

Courts routinely characterize social significance in this way. Judge-made law is constantly interpreting ambient culture to separate the reasonable from the unreasonable, the offensive from the inoffensive, the private from the public, and so forth. Such characterizations are commonplace in the enforcement of common law torts, and they are also commonplace in the enforcement of statutes. Justice Scalia, for example, recently noted that Title VII sexual harassment law requires courts to distinguish "between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." He

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363 See id.
364 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998). Scalia was concerned to distinguish a coach smacking a professional football player "on the buttocks as he heads onto the
observed that this distinction can be made only by exercising "an appropriate sensitivity to social context," to the full "constellation of surrounding circumstances, expectations, and relationships." Title VII could not be enforced unless courts were willing and able to determine the contextual cultural meaning of particular actions in this way.

Constitutional law, like common law or the application of statutes like Title VII, also requires courts to draw upon their understanding of cultural practices. Without making such judgments, courts could not apply equal protection doctrine to determine which sex-based classifications are "reflective of 'archaic and overbroad' generalizations about gender or based on 'outdated misconceptions concerning the role of females.'" They could not identify the communications that are constitutionally unprotected "fighting words," which, "as ordinary men know, are likely to cause a fight." They could not decide whether speech is "obscene" under relevant "community standards."

Consider, for example, how the Court came to determine whether movies were protected by the First Amendment. In 1915 the Court concluded that movies were not a protected form of communication. Justice Joseph McKenna, born in 1843, characterized the genre of film as a spectacle like a "circus" that did not come within the ambit of the First Amendment.

McKenna reached this conclusion based upon the same gesture applied to "the coach's secretary (male or female) back at the office." Id. at 81.

Id.

Id.


Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); see also Post, Constitutional Concept, supra note 222, at 638-39 ("[Cultural norms of civility] that distinguish appropriate from inappropriate ways of speaking . . . tend to define a point (although certainly not the only point) at which speech shades into conduct, at which a community subordinates speech to the regulatory schemes that it imposes upon action generally. This is explicitly true with respect to the tort of intentional infliction of emotional distress, which enforces a standard that makes no distinction at all between speech and conduct; but it is also characteristically true of the other dignitary torts, which carry the strong sense of a defendant having used 'words as instruments of aggression and personal assault.'" (quoting Time, Inc. v. Hill, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting))).


For a discussion on this topic, see Post, supra note 221, at 1252-53.

Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243-44 (1915). "The first impulse of the mind," McKenna wrote, "is to reject the contention" that movies deserve First Amendment protection. "We immediately feel that the argument is wrong or strained which extends the guarantees of free opinion and speech to the multitudinous shows which are advertised on the bill-
his apprehension of the social significance of film. "The judicial sense supporting the common sense of the country," McKenna wrote, "is against the contention" that movies enjoy a "practical and legal similitude to a free press and liberty of opinion."371 By 1952, however, the common sense of the country had so radically changed that Justice Tom Clark thought it obvious that cinema deserved First Amendment protection due to "[t]he importance of motion pictures as an organ of public opinion."372 Because the constitutional status of movies depends on the relationship between the genre of film and the values of communication safeguarded by the First Amendment, the constitutional law of film depends on cultural judgments about the significance of that genre in American life.

This does not imply that constitutional law is simply a form of cultural interpretation. The primary sources of constitutional law are specifically legal. The text of the Constitution is of course paramount. The text controls whenever its meaning is apparent, as for example when it directs that each state shall have two senators. But if the meaning of constitutional text is uncertain, courts must look outside the text in order to make constitutional law. They can look to various legal sources, like the original meaning of the Constitution, or the original intent of its Framers or ratifiers, or, most commonly, judicial precedents. But when, as frequently happens, these sources do not settle a question — as in 1952 they did not settle the question whether movies should be protected by the First Amendment — and when in such circumstances it becomes necessary to understand contemporary cultural practices in order to protect constitutional values, courts must interpret the significance of these practices in order to make constitutional law.

I take this point to be relatively uncontroversial. Even the strictest originalists, those who believe that the "meaning" of the Constitution "is changeless,"373 must find some way to account for the indisputable fact of constitutional evolution. The most typical explanation is that "[t]he provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their boards of our cities and towns and which ... seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion." Id.

371 Id. at 244. Films, McKenna concluded, were not "organs of public opinion." Id.
372 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952). Clark concluded that movies "are a significant medium for the communication of ideas." Id. "It is not without significance," he explained, "that talking pictures were first produced in 1926, eleven years after the Mutual decision." Id. at 502 n.12.
Changing cultural norms and practices quintessentially constitute “new conditions” that justify such constitutional pliability. That is why even the strictest originalists would be willing to accept that the First Amendment might properly be interpreted not to protect movies in 1915, but might nevertheless properly be interpreted to protect movies in 1952. The social significance of movies may have altered so as to bring film within the ambit of an otherwise “changeless” constitutional protection. It is precisely because constitutional law is not autonomous from culture that constitutional law properly evolves as culture evolves.

This point has important implications. Because, as we have seen, culture is always dynamic and contested, constitutional law will necessarily also be dynamic and contested. At what point in time the communicative significance of movies sufficiently changed as to bring film within the protection of the First Amendment, for example, will be an inevitably disputed question. Because culture is always in motion, because its meaning is never entirely stable or fixed, there will always be differences of cultural interpretation. There is simply no way to escape such controversy. There is no Archimedean point above the flux, no neutral or objective position. There are only contending interpretations within culture.

The point can be most plainly seen when cultural disagreement is caused not by the gentle logic of evolutionary change, but instead by outright and manifest dispute, like that between Chief Justice Rehnquist and Justice Souter in *ALA*. Rehnquist and Souter each offers his own interpretation of the nature of libraries and Internet filters. The argument between them does not turn on any simple matter of fact. The only way to decide which Justice is correct is to make an independent interpretation of the relationship between Internet filters and accepted library practices. Disputes over the nature of cultural significance typically cannot be definitively settled by reference to “objective” indicia; they are at root normative. There is no dictionary in which cultural significance can be decisively ascertained.

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374 *Id.* This explanation essentially assumes that constitutional rules remain constant, and “it is only their application which is extensible.” *Id.* One problem with this kind of explanation is that, for reasons already canvassed, it is not easy to distinguish the substance of a rule from the scope of its application. See *supra* pp. 46–48.

375 On the dynamic and contentious nature of culture, see *supra* notes 241 and 245.

376 *Troxel v. Granville*, 530 U.S. 57 (2000), which concerns the substantive due process rights of parents to prevent grandparents from visiting their grandchildren, exemplifies the tension that can arise when the Court struggles to interpret cultural norms in the context of “changing realities.” *Id.* at 64; see also *id.* at 98 (Kennedy, J., dissenting).


378 For a discussion of the role of law as an institution used to impose stability upon evolving or contested cultural norms, see Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in NOMOS XXXV: DEMOCRATIC COMMUNITY 163, 168–69.
Last Term in *Virginia v. Black*, for example, Justice Thomas concluded that because "[i]n our culture, cross burning has almost invariably meant lawlessness," a statute penalizing cross burning "prohibits only conduct, not expression." The Court, however, disagreed, advancing its own understanding that cross burning can sometimes constitute "proscribable intimidation" and sometimes "core political speech," depending upon circumstances. In debating these questions, the Justices reflect differences of opinion in society at large, which has its own conflicting constructions of the significance of cross burning. Because the Court must interpret the meaning of cross burning in order to make constitutional law, and because whatever interpretation it offers will be contestable, the Court can decide *Virginia v. Black* only by taking sides in a cultural controversy. There is no innocent position.

This consequence is an important reason why Justice Scalia believes that constitutional law must be autonomous from culture. In a memorable dissent last Term in *Lawrence v. Texas*, Scalia scored the Court for taking "sides in [a] culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." The plausibility of Scalia's position depends upon whether constitutional law can meaningfully proceed without making cultural judgments. If, as I have argued, it cannot, then neither can constitutional law be autonomous from culture, nor can the Court be merely a "neutral observer." *Brown* and *Frontiero* both intervened in culture wars, and neither opinion can properly be criticized for doing so. Instead of pursuing the chimerical objective of neutrality, the Court would do better to analyze the conditions under which courts should properly make cultural judgments.


380 *Id.* at 1564 (Thomas, J., dissenting); see also *id.* at 1562 ("In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred and the profane. I believe that cross burning is the paradigmatic example of the latter." (citations omitted)).

381 *Id.* at 1566.

382 *Virginia v. Black*, 123 S. Ct. at 1551.


385 *Id.* at 2497 (Scalia, J., dissenting); see also *id.* at 2498 (charging that the Court has cast "aside all pretense of neutrality").

386 See supra pp. 77–80.
There is no area of constitutional law where these issues are more fraught than substantive due process, where the Court interprets the Due Process Clause\(^{387}\) to prohibit certain forms of substantive state regulation. Because substantive due process doctrine has historically engaged in remarkably candid efforts to interpret and apply cultural values, Scalia would abandon the doctrine altogether, viewing it as an improper "springboard[] for judicial lawmaking."\(^{388}\) But his view has not prevailed, and the doctrine has occasioned fierce debates about the proper relationship of the Court to cultural controversy.

These debates are fueled by ferocious divisions within the Court about the constitutional values that substantive due process is meant to protect. Although the Court seems to agree that "[t]he Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint,"\(^{389}\) the Justices bitterly disagree about the constitutional function of the doctrine.\(^{390}\) Modern substantive due process began with Justice Harlan's magiste-
rial dissent in *Poe v. Ullman*, in which he conceived the doctrine as marking “the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty


As an instrument of Lochnerism, substantive due process protected from unnecessary regulation forms of “liberty” that were associated with “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted). In the pre-New Deal era, common law was understood to “spring[] from custom” that embodied “the experience of free men,” Charles E. Hughes, President Hughes Responds for Association, Speech Before English, Canadian, and American Lawyers at Westminster Hall (July 21, 1924), in *American Lawyers Welcomed in Historic Westminster Hall*, 10 A.B.A. J. 565, 567, 569 (1924), while the liberty protected by due process was understood to follow “[t]he common law rule . . . by which each individual [is] given independence in his action, so long as that independence did not infringe the independence of another,” William H. Taft, *The Social Importance of Proper Standards for Admission to the Bar, in Report of the Thirty-Sixth Annual Meeting of the American Bar Association* 924, 931 (1913). The requirements of substantive due process were thus conceptualized as “an education in reasonableness after the essential method of the common law.” Hughes, supra, at 569. For a discussion of the relationship between common law and pre-New Deal substantive due process, see Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L.J. 1513, 1591–92, 1602 (2002); and Post, *Defending the Lifeworld*, supra, at 1536–41.

Substantive due process doctrine functioned to resist regulatory “interference . . . with the ordinary trades and occupations of the people,” which the Court at the time of *Lochner* believed was “on the increase.” *Lochner v. New York*, 198 U.S. 45, 63 (1905). Regulatory statutes, in contrast to the organic freedoms and obligations of common law, tended to be conceived as “insidious encroachments upon liberty which take the form of an uncontrolled administrative authority — the modern guise of an ancient tyranny, not the more welcome to intelligent free men because it may bear the label of democracy.” Hughes, supra, at 569. Substantive due process was in this sense connected to the traditional principle that statutes in derogation of the common law should be narrowly construed. On this principle, see, for example, William N. Eskridge, Jr. et al., *Legislation and Statutory Interpretation* 331–35 (2000); and David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 948–49 (1992). Although substantive due process did not protect all common law rights, or only common law rights, its scope of application was, like the common law itself, thought to spring organically from the history and experience of the nation, and to protect “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).
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and the demands of organized society." Harlan portrayed the Court as continuously reassessing this balance:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

The contemporary significance of tradition was for Harlan a matter of normative evaluation, so there could be no "mechanical yardstick," no "mechanical answer" to the questions posed by substantive due process. Because "the compendious notion of 'liberty' embraced in the Fourteenth Amendment" was not "a series of isolated points," but instead "a rational continuum" in which "certain interests require[d] particularly careful scrutiny of the state needs asserted to justify their abridgment," substantive due process required courts to weigh the value of "the 'ordered liberty' assured against state action by the Fourteenth Amendment."

392 Poe, 367 U.S. at 542 (Harlan, J., dissenting).
393 Id.
395 Poe, 367 U.S. at 544 (Harlan, J., dissenting) (quoting Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)) (internal quotation marks omitted) ("Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yardstick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." (alteration in original)).
396 Id.
397 Id. at 543. Perhaps because of the debacle of Lochnerism, Harlan himself steered clear of identifying protected liberty interests with traditional common law rights. See, e.g., id. at 543-44 (identifying the liberty to educate children freely with the guarantee of freedom of expression in the First Amendment). Harlan even cited Meyer v. Nebraska, 262 U.S. 390 (1923), in a way that specifically excised McReynolds's references to the common law. See Poe, 367 U.S. at 543-44 (Harlan, J., dissenting). For a relatively recent decision that maintains the older alliance between the liberty protected by substantive due process and common law rights, see Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 277-78 (1990). See also Washington v. Glucksberg, 521 U.S. 702, 725 (1997) ("The right assumed in Cruzan . . . was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions.").
Harlan’s approach derived from the orientation of pre-New Deal substantive due process, which sought to assess whether liberty interests were “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”\(^{399}\) Within a relatively short period of time, however, the Court began to drift into a very different approach. Instead of identifying constitutionally protected liberty interests by reference to the contemporary significance of tradition, it began to identify such interests by directly evaluating the intrinsic value of liberty itself.\(^{400}\)

This tendency became more pronounced as the Court came to focus on liberty interests in sexuality, an area that traditionally had been highly regulated.\(^{401}\) The Court began to speak of a freestanding “right of privacy”\(^{402}\) that was only tenuously connected to traditional values. The trend culminated in *Roe v. Wade*,\(^{403}\) where the Court held that in the teeth of historical regulation “[t]his right of privacy . . . founded in the Fourteenth Amendment’s concept of personal liberty . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”\(^{404}\) *Roe* used substantive due process to protect a liberty interest that the Court believed was constitutionally valuable, even if that interest was not immanent in the history and tradition of the nation.\(^{405}\)

*Roe* raised the question why the Court would protect some liberty interests, but not others. The Court has never offered a definitive liberty explanation, but the leading candidate is that substantive due process protects those forms of liberty that are necessary to preserve “the ability independently to define one’s identity that is central to any concept of liberty.”\(^{406}\) “At the heart of liberty,” we are told, “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not de-

\(^{399}\) Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); see also *supra* note 391.

\(^{400}\) The tendency to drift in this direction was held in check in pre-New Deal substantive due process because of the doctrine’s intense focus on common law rights. *See supra* note 391.

\(^{401}\) By contrast Harlan had emphasized the values of “marital privacy” and “intimacy,” which turned on “the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.” Poe, 367 U.S. at 553 (Harlan, J., dissenting). Liberty to engage in sexual conduct was therefore comparatively unimportant to Harlan. Compare *id.*, with *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (focusing on the individual right of privacy in a case relating to the legality of the distribution of contraceptives to unmarried persons).

\(^{402}\) *Eisenstadt*, 405 U.S. at 453.

\(^{403}\) 410 U.S. 113 (1973).

\(^{404}\) *Id.* at 153.

\(^{405}\) *See id.* at 117–18, 118 n.2, 147–50.

fine the attributes of personhood were they formed under compulsion
of the State.\footnote{407} The upshot of these developments is that by the 1980s the Court
had adopted two distinct approaches to defining the scope of substan-
tive due process. The first, which I shall call the “traditional” ap-
proach, focused on a hermeneutics of history and tradition; the second,
which I shall call the “autonomy” approach, focused on the forms of
liberty prerequisite for “personal dignity and autonomy.”\footnote{408} Each ap-
proach required the Court independently to ascertain the value of lib-
erty interests, either by reference to the immanent significance of such
interests in American tradition, or by reference to the role of such in-
terests in the self-definition of persons.

Both approaches justified substantive due process by a particular
account of the nature of the Constitution. Because the traditional ap-
proach conceived the Constitution as the reflection of the “whole ex-
perience”\footnote{409} of the American people, it held that the Constitution pro-
tected those liberty interests that were “fundamental . . . as they have
been understood by the traditions of our people and our law.”\footnote{410} Be-
cause the autonomy approach conceptualized the Constitution as a
framework for democratic self-determination, it held that the Constitu-
tion protected the autonomy of citizens to define their own identities in
a manner that would allow them to remain sufficiently independent
from the state as to preserve the legitimacy of democratic consent.\footnote{411}

These two accounts of substantive due process collided in Bowers
v. Hardwick,\footnote{412} which upheld a Georgia anti-sodomy statute.\footnote{413} Ju-
tice White’s opinion for the Court adopted the traditional approach. It
asked whether the right of “homosexuals to engage in sodomy”\footnote{414} was

protected by the Fourteenth Amendment [encompasses] the most intimate and personal choices a
person may make in a lifetime, choices central to personal dignity and autonomy.”).
\footnote{408} Id.
\footnote{409} Missouri v. Holland, 252 U.S. 416, 433 (1920).
\footnote{410} Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also supra pp. 36–
37.
\footnote{411} See Jed Rubenfeld, Reading the Constitution as Spoken, 104 YALE L.J. 1119, 1169 (1995);
zens can hardly confer democratic legitimacy on the state if that consent is itself the product of
state regulation. See Post, Between Democracy and Community, supra note 378, at 174–75; Post,
Defending the Lifeworld, supra note 391, at 1533–39. To the extent that consent flows from iden-
tity, and to the extent that identity is constructed by the state, the state cannot claim democratic
legitimacy. See id. at 175. But because the state shapes the identity of citizens in so many ways,
the locus of identity that must remain independent of state regulation must be conceptualized as a
moral construction that evolves in time as cultural conceptions of the self change.
\footnote{412} 478 U.S. 186 (1986).
\footnote{413} See id. at 189.
\footnote{414} Id. at 190.
“deeply rooted in this Nation’s history and tradition.” Justice Blackmun’s dissent, by contrast, adopted the autonomy approach, asking whether the Georgia statute infringed “the fundamental interest all individuals have in controlling the nature of their intimate associations with others.” Blackmun argued that these associations merited constitutional protection because they “form so central a part of an individual’s life” as to be necessary to “an individual’s self-definition.”

Although Justices White and Blackmun used distinct forms of constitutional doctrine to identify and protect distinct constitutional values, we should not miss the common ground that underlay their disagreement. Both White and Blackmun assumed that the liberty protected by the Due Process Clause could not be identified unless the Court determined for itself the significance of relevant liberty interests. Both White and Blackmun also understood that such a determination could not be settled by reference merely to legal sources, but would require forms of normative evaluation that would entail potentially controversial cultural judgments.

It is true that White’s opinion in Bowers reviewed the historical record in so flat and disdainful a manner as effectively to efface the Court’s own normative involvement in evaluating the present worth of the nation’s tradition. This disdain expressed White’s manifest skepticism about substantive due process doctrine itself, which he regarded as chiefly reflecting the Court’s effort “to assure itself and the

415 Id. at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted).
416 Id. at 206 (Blackmun, J., dissenting).
417 Id. at 204–05.
418 On the possible theoretical convergence of these approaches, see Post, Defending the Lifeworld, supra note 391, at 1530–39, which postulates that “the very independence from state managerial control required by constitutional democracy can in fact be understood as embodied in specific historical social practices.” Id. at 1533–34.
419 White was required by the traditional approach to determine if the asserted liberty interest in sodomy was “implicit in the concept of ordered liberty.” Bowers, 478 U.S. at 191 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted). Blackmun was required by the autonomy approach to determine if the asserted liberty interest in sodomy was essential to the construction of the self. See supra note 411.
420 Blackmun’s argument in his Bowers dissent that “individuals define themselves in a significant way through their intimate sexual relationships with others” committed him to a host of controversial cultural judgments about the relationship between sexuality and identity. Bowers, 478 U.S. at 205 (Blackmun, J., dissenting). White’s argument in his majority opinion that the freedom of private sexual conduct between consenting adults was not a liberty interest that was so immanent in the nation’s tradition as to be “implicit in the concept of ordered liberty” entailed an equally controversial assimilation of cultural judgments. Bowers, 478 U.S. at 191–92 (quoting Moore, 431 U.S. at 503 (plurality opinion); and Palko, 302 U.S. at 325) (internal quotation marks omitted).
421 White concluded that “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” Bowers, 478 U.S. at 194.
public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government.\textsuperscript{422} White indicated that he was loathe to exercise the Court's "authority to discover new fundamental rights imbedded in the Due Process Clause," because he believed that the "Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."\textsuperscript{423} He concluded that "[t]here should be . . . great resistance" to expanding the protections of substantive due process, lest "the Judiciary necessarily take[] to itself further authority to govern the country without express constitutional authority."\textsuperscript{424}

White's hostility to the very project of substantive due process anticipated yet another shift in substantive due process doctrine. Justices who shared White's skepticism began in the years after \textit{Bowers} to craft decisions that fundamentally modified both the traditional and the autonomy approaches.\textsuperscript{425} These decisions culminated in Chief Justice Rehnquist's far-reaching opinion for the Court in \textit{Washington v. Glucksberg},\textsuperscript{426} which proposed a profound reconceptualization of substantive due process.\textsuperscript{427} \textit{Glucksberg} collapsed all of substantive due process doctrine into the traditional approach, arguing that the Court's past decisions focusing on "personal autonomy" were in reality merely efforts to identify "personal activities and decisions . . . so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."\textsuperscript{428}

\textit{Glucksberg} then fashioned a "restrained methodology"\textsuperscript{429} that imposed a straitjacket on the traditional approach. It held that the Due Process Clause protected only carefully described and specific liberty

\textsuperscript{422} \textit{Id.} at 191.

\textsuperscript{423} \textit{Id.} at 194.

\textsuperscript{424} \textit{Id.} at 195.

\textsuperscript{425} \textit{See}, e.g., \textit{Reno v. Flores}, 507 U.S. 292, 301–06 (1993) (holding that children without guardians and in government custody do not have a fundamental right to be placed in private custody rather than in government institutions); \textit{Michael H. v. Gerald D.}, 491 U.S. 110, 121–30 (1989) (holding that a natural father's interest in a parental relationship with a child born into an existing marriage between the mother and another man is not a fundamental right); \textit{United States v. Salerno}, 481 U.S. 739, 748–52 (1987) (holding that the government interest in community safety can "outweigh an individual's liberty interest" and thus justify pretrial detention).

\textsuperscript{426} 521 U.S. 702 (1997). Chief Justice Rehnquist's opinion was joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

\textsuperscript{427} \textit{See id.} at 719–28.

\textsuperscript{428} \textit{Id.} at 727. The Court pointedly observed: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." \textit{Id.}

\textsuperscript{429} \textit{Id.} at 721.
interests that could, "objectively," be found to be so "deeply rooted in this Nation’s history and tradition" as to be termed "fundamental." Glucksberg ruled that the government could not infringe fundamental liberty interests "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Conversely, the government could freely regulate non-fundamental liberty interests so long as there was "a reasonable relation to a legitimate state interest to justify the action."

Glucksberg modified the traditional approach in three principal ways. First, it eliminated the "rational continuum" of liberty and substituted a strict bifurcation between liberty interests that were "fundamental" and all other liberty interests. This bifurcation prevented courts from evaluating the unique strength of particular liberty interests. Second, Glucksberg established a rigid dichotomy between regulations of fundamental liberty interests, which would be subject to strict scrutiny, and regulations of all other liberty interests, which would be subject only to some variant of rational basis review. This dichotomy prevented the Court from balancing the force of particular liberty interests against the strength of particular regulatory interests.

It is significant that at the very moment that Glucksberg created a strong incentive for courts to avoid classifying liberty interests as "fundamental," because fundamental liberty interests were virtually immune from state regulation, Glucksberg also prevented courts from restraining the regulation of non-fundamental liberty interests.

Third, and most pertinent to our inquiry, Glucksberg profoundly altered the nature of the Court’s encounter with American history. The traditional approach had contemplated a dialogue between the Court and a "living tradition," in which the Court independently evaluated the significance of liberty interests immanent in American history. No "mechanical yard-stick" could substitute for the necessity of this inde-

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430 Id. (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted).
431 Id. at 720–21 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (internal quotation marks omitted).
432 Id. at 722.
433 See id. at 721–22. “All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.” Lawrence v. Texas, 123 S. Ct. 2472, 2492 (2003) (Scalia, J., dissenting).
ependent evaluation. In sharp contrast to this approach, *Glucksberg* instructed courts to categorize liberty interests as "fundamental" on the basis of "objective" facts. Courts were to protect narrowly defined and specific liberty interests if and only if they had actually been protected in American history. Historical facts thus functioned precisely as the mechanical yardstick rejected by Harlan in *Poe*, for they served automatically to determine whether a particular liberty interest was fundamental, and they did not require the Court itself independently to assess the significance of that interest.

By collapsing substantive due process into a question of historical fact, *Glucksberg* transformed the Court from an institution engaged in cultural judgments into an institution that enforced the cultural judgments of others.\(^{435}\) The whole point of *Glucksberg*’s doctrinal innovation was to prevent "the liberty protected by the Due Process Clause" from being "subtly transformed into the policy preferences of the Members of this Court,"\(^{436}\) which is to say to prevent the Court from exercising independent judgment about the constitutional significance of the liberty interests protected by the Due Process Clause.\(^{437}\) Formulated in this way, substantive due process doctrine did not require the Court to embroil itself in the controversies that necessarily attend cul-

\(^{435}\) The origins of this approach lie in Justice Scalia’s opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion). For a discussion of Justice Scalia’s approach, see *supra* note 244; Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1513–14 (1999); and David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1700–08 (1991). I should note that *Glucksberg* does not advance a version of substantive due process doctrine that is autonomous from culture, because it contemplates that the beliefs of non-judicial actors are a proper source for determining the scope of constitutional law.

\(^{436}\) *Glucksberg*, 521 U.S. at 720.

\(^{437}\) *Glucksberg* formulates the question as though the identification of protected liberty interests requires a choice between relying on "objective" facts or instead on the subjective “preferences” of judges. See *id.* at 720–22. Given this choice, of course, doctrine must appeal to objective facts, for it would be quite unacceptable to authorize unelected judges to impose their subjective preferences on the nation. *Glucksberg* thus seeks to "rein in the subjective elements that are necessarily present in due process judicial review." *Id.* at 722.

The thrust of the traditional approach, however, was to avoid this choice between objective facts and subjective preferences by formulating substantive due process doctrine in a way that directed courts to decide cases by reference to the *intersubjective* norms implicit in the “living” tradition of the nation. Poe v. Ullman, 357 U.S. 497, 542 (1961) (Harlan, J., dissenting). Thus Harlan had argued that substantive due process doctrine does not permit judges to "draw on [their] merely personal and private notions," but instead requires them to exercise "judgment" by applying "considerations deeply rooted in reason and in the compelling traditions of the legal profession." *Id.* at 544–45 (quoting *Rochin v. California*, 342 U.S. 165, 170–71 (1952)) (internal quotation marks omitted). The distinction between intersubjective norms and subjective preferences is fundamental to the law and is discussed in Post, *Constitutional Concept*, *supra* note 222, at 624–26. Rehnquist, however, has consistently formulated his jurisprudence in a manner designed to deny this distinction. *See*, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *supra* pp. 30–31.
tural judgments. In effect, *Glucksberg* modified the doctrine so as to make it compatible with Scalia's standard of neutrality.\(^4\)

This neutrality was purchased at a high price, however, for *Glucksberg*’s doctrinal modifications effectively stripped substantive due process of its basic purpose and function. Before *Glucksberg*, substantive due process doctrine, in both its traditional and autonomy branches, protected liberty interests because the Court itself regarded those interests as constitutionally valuable and therefore worthy of judicial protection. In contrast, *Glucksberg* would have the Court intervene to protect cultural values merely because others in the past have deemed these values to be important. We may ask, however, why the Court should be required to do this.\(^4\) What constitutional purpose is served if the Court is instructed to invalidate state actions on the basis of values which the Court itself may not even believe are significant? *Glucksberg*’s formulation of substantive due process doctrine is so strangely alienated that its chief purpose seems to be to eliminate the doctrine altogether.\(^4\)

*Glucksberg* thus poses a stark choice: either the

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\(^4\) Of course the question whether the “objective” facts warrant identifying a right as fundamental is itself a question of judgment, but it is not the kind of judgment that need be inconsistent with Scalia’s concern that the Court remain neutral in cultural controversies.

\(^4\) David Strauss observes that the kind of traditionalism advanced by Scalia and embodied in *Glucksberg* “looks very much like the exact position that Holmes called revolting—that there is no reason to uphold a practice other than that it dates from Henry IV, or George III.” Strauss, *supra* note 435, at 1710. Strauss concludes that traditionalism of this kind “is just not an acceptable creed. At bottom neither Justice Scalia nor anyone else arguably within the legal mainstream today accepts its implications.” *Id.* at 1711–12.

\(^4\) This purpose may also be inferred from the shrewd way in which the “restrained methodology” imposed by *Glucksberg* reduces substantive due process into a doctrine that is for all practical purposes toothless. See *supra* pp. 91–94. Conservative hostility to substantive due process doctrine has a number of distinct sources. Sometimes, as in White’s *Bowers* opinion, this hostility focuses on the charge that substantive due process protects “rights not readily identifiable in the Constitution’s text.” *Bowers* v. Hardwick, 478 U.S. 186, 191 (1986); see also John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV 493, 494–95 (1997) (suggesting that because substantive due process comes from beyond the text of the Constitution, its “precedential authority... is less than it might seem”); Rehnquist, *supra* note 16, at 702–04 (describing the way in which the understanding of substantive due process has evolved beyond the text of the Constitution). I have always found this charge to be unconvincing, however, because the word “liberty” in the Due Process Clause seems to provide at least as much meaningful guidance as does the word “equal” in the Equal Protection Clause.

If the objection is instead that the text of the Clause warrants providing only protections of process rather than protections of substance, see, e.g., SCALIA, *supra* note 134, at 24–25, it is striking that even those Justices who are most theoretically opposed to substantive due process, like Scalia and Rehnquist, are also nonetheless enthusiastic about applying the equal protection component of the Due Process Clause of the Fifth Amendment to the federal government. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–31 (1995). That component is both substantive and without textual foundation. The incorporation doctrine, moreover, which reads the substantive content of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, is also irredeemably substantive, yet it is virtually immune from criticism. Objections to substantive due process doctrine sometimes invoke the distinct idea that substantive due process protects liberty interests that are without “cognizable roots in the... design of the Constitution.”
Court can preserve its neutrality by refraining from exercising cultural judgments, thereby effectively ceasing to protect the constitutional values traditionally associated with substantive due process, or the Court can continue to safeguard those values at the cost of embroiling itself in cultural controversy. It cannot have it both ways.

This was the doctrinal landscape onto which, on the last day of the Term, Lawrence v. Texas\textsuperscript{441} exploded. At issue in Lawrence was a Texas statute that imposed criminal penalties on sodomy committed between members "of the same sex."\textsuperscript{442} Justice Kennedy, in an opinion joined by four other Justices,\textsuperscript{443} held that the statute was unconstitutional on substantive due process grounds, and he took deliberate care to rule:

\begin{quote}
Lawrence, 478 U.S. at 194. But for the reasons stated above, supra p. 89, I also find this claim implausible.

My best guess, therefore, is that the chronic suspicion that plagues substantive due process doctrine derives not from the doctrine's lack of connection to the text or to the design of the Constitution, but instead from the fact that these connections are operationalized in vague and indeterminate ways. Both the traditional and autonomy approaches to substantive due process depend upon doctrinal tests that are abstract and underspecified, so that their application depends to a very large degree on unstated assumptions that neither are nor can be rendered fully explicit. The doctrine accordingly reposes a good deal of faith in the common sense and statesmanship of judges, which is a reason for many to distrust it. As even the most liberal Justices concede:

[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. ... The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

\end{quote}

In the eyes of conservative Justices like Rehnquist or Scalia, the doctrinal vagueness of substantive due process invites the Court to be seen as enforcing the personal preferences of Justices instead of the intersubjective norms of the nation, see supra note 437, and the potential for this slippage argues for the elimination of the doctrine altogether. The force of this argument depends upon balancing the costs of leaving unprotected the liberty interests that would otherwise be safeguarded by substantive due process against the costs of involving the Court in cultural controversies that may lead the public to regard constitutional law as the imposition of the Justices' own personal views.

The tack taken by Justice Scalia and other conservative Justices, and also in essence by decisions like Glucksberg, is to assess this balance categorically, effectively requiring the Court to withdraw altogether from the field of substantive due process. A different tack would be to assess this balance on a case-by-case basis, so that the danger to judicial legitimacy of particular substantive due process decisions would be weighed against the importance of particular liberty interests. The right wing of the Court seems unwilling to endorse this approach, no doubt regarding it as a slippery slope.

\textsuperscript{441} Id. at 194.

\textsuperscript{442} Id. at 2476.

\textsuperscript{443} Justice Kennedy's opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Id. at 2475. Kennedy's opinion was all the more dramatic because he himself had joined the Court's opinion in Glucksberg. Washington v. Glucksberg, 521 U.S. 702, 704 (1997). Justice O'Connor concurred separately in the judgment, holding that the Texas statute should have been struck down under the Equal Protection Clause. See Lawrence, 123 S. Ct. at 2484 (O'Connor, J., concurring in the judgment). Chief Justice Rehnquist and Justices Scalia and Thomas dissented. Id. at 2488 (Scalia, J., dissenting).
Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.\footnote{Lawrence, 123 S. Ct. at 2484.}

Kennedy’s opinion is extravagant and passionate. It simply shatters, with all the heartfelt urgency of deep conviction, the paralyzing carapace in which Glucksberg had sought to encase substantive due process. Lawrence ignores Glucksberg’s sharp bifurcation between “fundamental” liberty interests and other liberty interests. It instead focuses on the particular liberty interests endangered by the Texas statute, savoring their unique valence and exploring their particular significance, as Harlan had urged more than forty years ago in his Poe opinion. Kennedy’s opinion also ignores Glucksberg’s rigid dichotomy between strict scrutiny and rational basis review. It instead balances the strength of Texas’s regulatory interests against the specific liberty interests threatened by the Texas statute. Lawrence concludes that the “Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”\footnote{Id. at 2488 (emphasis added). Justice Scalia, in dissent, furiously condemns Lawrence's refusal to be bound by Glucksberg's methodological innovations. Id. at 2488, 2491–92 (Scalia, J., dissenting).}

Finally, and most importantly, Lawrence does not turn on objective facts or on the value judgments of others. Instead the Court unabashedly engages the values it perceives to be at stake in the case. The opinion observes that although “times can blind us to certain truths[,] . . . later generations can see that laws once thought necessary and proper in fact serve only to oppress.”\footnote{Id. at 2477.} Lawrence plainly expresses its own vision of such truths; it articulates the Court’s own understanding of what is “of fundamental significance in defining the rights of the person.”\footnote{Lawrence, 123 S. Ct. at 2484.} And because it directly makes value judgments of this kind, Lawrence necessarily implicates itself in cultural controversy. Scalia is therefore right to accuse the Court of losing its neutrality. But this loss is an inevitable consequence of the Court’s making the evaluative judgments necessary to fulfill the purpose of substantive due process doctrine, which is to identify and protect liberty interests that the Court deems constitutionally valuable.

Lawrence is a strikingly innovative opinion. Although it nods in the direction of the traditional approach, noting “in the past half century” an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in mat-

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\footnote{Lawrence, 123 S. Ct. at 2484.}

\footnote{Id. at 2488 (emphasis added). Justice Scalia, in dissent, furiously condemns Lawrence's refusal to be bound by Glucksberg's methodological innovations. Id. at 2488, 2491–92 (Scalia, J., dissenting).}

\footnote{Lawrence, 123 S. Ct. at 2484.}

\footnote{Id. at 2477.}
ters pertaining to sex," Lawrence uses these observations more to chip away at Bowers’s historical references than to establish the constitutionally protected nature of a liberty interest in private sodomy between consenting adults. Although the Court in Lawrence also repeatedly invokes the autonomy approach to substantive due process, announcing at the beginning of its opinion that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” it makes no focused effort to link the behavior regulated by the Texas statute to a specifically constitutional dimension of autonomy, like the self-definition that was so important to Blackmun’s dissent in Bowers. Instead the theme of autonomy floats weightlessly through Lawrence, invoked but never endowed with analytic traction. Lawrence thus breaks with both the traditional and autonomy approaches to substantive due process. Its legal and rhetorical energy seems directed elsewhere, at a concern for the dignity of enduring intimate relationships and a refusal to permit “stigma” to be imposed because of those relationships. Lawrence notably refers to “the due process right to demand respect for conduct protected by the substantive guarantee of liberty,” and it affirms that the “petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Themes of respect and stigma are at the moral center of the Lawrence opinion, and they are entirely new to substantive due process doctrine. They signal that the Court is concerned with con-

448 Id. at 2480. Lawrence also notes the decreasing number of states that prohibit sodomy and, in those states that do prohibit it, a “pattern of nonenforcement with respect to consenting adults acting in private.” Id. at 2481.

449 See id. at 2480–84. It should also be noted that Lawrence’s holding that “Bowers was not correct when it was decided,” id. at 2484, is in some tension with interpreting Lawrence as turning on an “emerging awareness,” id. at 2474.

450 See id. at 2478, 2481–82.

451 Id. at 2475. Lawrence cites with approval Justice Stevens’s dissent in Bowers to the effect that “neither history nor tradition could save a law” that infringes the “liberty” of “unmarried . . . persons” to make “intimate choices.” Id. at 2483 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted).

452 See id. at 2478.

453 Id. at 2482.

454 Id. Lawrence also refers to “the respect the Constitution demands for the autonomy of the person in making [protected] choices.” Id. at 2481.

455 Id. at 2484. Lawrence’s condemnation of the state for seeking to “control” the destiny of the petitioners is consistent with the autonomy branch of substantive due process.

institutional values that have not heretofore found their natural home in the Due Process Clause.

The notion that persons are "entitled" to "demand respect" for their "private lives" must be parsed with some care. It is unlikely that Lawrence intends to authorize persons to demand from the state affirmative indicia of respect, both because this would impose an unusual positive obligation on the state,\textsuperscript{457} and because it is entirely unclear what such indicia might be. It is therefore more plausible to interpret Lawrence as prohibiting the state from stigmatizing or demeaning the private lives of persons.

Conceiving due process rights in this way marks a point of departure from the autonomy approach to due process, which focuses on the deprivations that persons experience when they are unable to perform conduct that is constitutionally protected. Lawrence does not emphasize such deprivations; it does not focus on the injuries that persons would suffer were they unable to practice sodomy. It instead focuses on the stigma that the Texas statute inflicts on persons whom the public associates with the practice of sodomy.\textsuperscript{458} This association defines a group that anti-sodomy laws cause to be demeaned in the eyes of others.

Not all prohibitions of private sexual conduct inflict disgrace in this way. Because the use of contraceptives is not associated with any particular group, the anti-contraceptive statute that was at issue in Griswold could not have been analyzed in terms of the paradigm of stigma and respect that preoccupies Lawrence.\textsuperscript{459} The perception that the Texas anti-sodomy statute imposes second-class citizenship on an identifiable class of persons, by contrast, is at the core of Lawrence's analysis. Lawrence thus seeks to redress harms that are traditionally associated with equal protection analysis, rather than with substantive due process.\textsuperscript{460} This renders Scalia's dissent, which condemns the Court for inventing out of whole cloth "a brand-new 'constitutional right'...\textsuperscript{457} See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (holding that the Due Process Clause is a "limitation" on government that cannot fairly be read as imposing an "affirmative obligation" on states).

\textsuperscript{458} Lawrence, 123 S. Ct. at 2482.

\textsuperscript{459} At issue in Griswold was a Connecticut statute that imposed criminal penalties on the use of "any drug, medicinal article or instrument for the purpose of preventing conception." Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

impatient of democratic change," somewhat off the mark, for the Court has been using the Equal Protection Clause to recognize and repair such harms for more than two generations. Although Lawrence’s conclusions may be attacked on the merits, the Court is plainly not intervening to protect some heretofore unknown constitutional value. The relevant question is why Lawrence chooses to protect the value of equal citizenship with the Due Process Clause.

The question deepens when it is seen how closely Lawrence comes to explicitly melding the concerns of equal protection with those of due process. “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty,” the Court states, “are linked in important respects, and a decision on the latter point advances both interests.” The Court explains that it will not narrowly strike down the Texas statute under the Equal Protection Clause for prohibiting homosexual but not heterosexual sodomy, because such an approach would be insufficient. States might respond by prohibiting all sodomy, and “[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.” Lawrence concludes:

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of Bowers has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

This passage sounds almost entirely in equal protection. It does not state that a law prohibiting sodomy should be struck down because it would deprive all persons of the valuable liberty of engaging in sodomy, but instead asserts that such a statute is unconstitutional because it will invite “discrimination both in the public and in the private spheres” against the class of persons who are publicly associated with sodomy, which constitutes the group of “homosexual persons.”

If Lawrence turns on values usually associated with antidiscrimination law, why does the Court not use the Equal Protection Clause to overrule Bowers? To do so would require the Court to hold that statutes prohibiting sodomy are, in effect, classifications based upon sexual orientation. Assuming the Court could overcome this hurdle, it

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461 Lawrence, 123 S. Ct. at 2497 (Scalia, J., dissenting).
462 Lawrence, 123 S. Ct. at 2482.
463 Id.
464 Id.
465 Such a holding could prove quite tricky in the context of anti-sodomy laws that are written in a facially neutral way to prohibit all sodomy. To pierce this facial neutrality would require the
would have to determine whether classifications based upon sexual orientation should receive elevated scrutiny or merely rational basis review. If the former, the Court would instantly render constitutionally suspicious all state laws that discriminate based upon sexual orientation, including those dealing with marriage, children, and the military. If the latter, the Court could overrule Bowers only by holding that anti-sodomy laws are the result of mere "animus." In effect, the Court would have to intervene into the national controversy over the status of homosexuality by branding supporters of anti-sodomy laws as prejudiced bigots.

By using the Due Process Clause, however, the Court can avoid these difficulties. It need not address the question of facial classifications. Because Lawrence builds on due process decisions attributing special constitutional value to "the personal and private life of the individual," the Court need not confront the entire range of state stat-

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467 See, e.g., Ex parte H.H., 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring specially) ("The homosexual conduct of a parent — conduct involving a sexual relationship between two persons of the same gender — creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others."); S v. S, 608 S.W.2d 64, 65 (Ky. Ct. App. 1980) (holding that the lesbian mother's "deviate practice is sufficient, in this case, to warrant the change" in custody rights from mother to father (emphasis omitted)); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("[T]he gay father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law.").

468 See, e.g., Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1137 (9th Cir. 1997) (upholding a federal statute banning from military service those who admit their homosexuality); Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980) (upholding "the Navy's blanket rule requiring discharge of all who have engaged in homosexual conduct").

469 See Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that an amendment to a state constitution prohibiting all legislative, executive, or judicial action designed to protect homosexual persons from discrimination violates equal protection for “the amendment seems inexplicable by anything but animus toward the class it affects”).

470 In her concurring opinion, Justice O'Connor effectively opts for the second of these alternatives. O'Connor concludes that "[t]he Texas sodomy law 'raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'" Lawrence v. Texas, 123 S. Ct. 2472, 2486 (2003) (O'Connor, J., concurring in the judgment) (second alteration in original) (quoting Romer, 517 U.S. at 634).

471 Lawrence, 123 S. Ct. at 2484. The origin of the focus on this special constitutional value in substantive due process doctrine seems to lie in the traditional approach articulated by Justice Harlan's dissent in Poe. In his opinion, Harlan viewed a Connecticut law prohibiting the use of
utes that discriminate on the basis of sexual orientation. It need only commit itself to striking down those state statutes that intrude into this protected realm. And because Lawrence interprets substantive due process doctrine as balancing state regulatory interests against constitutionally protected liberty interests, the Court need conclude only that “the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” The Court can avoid inflammatory accusations of bigotry by acknowledging the “profound and deep convictions accepted as ethical and moral principles” that support condemnations of “homosexual conduct as immoral.”

These advantages are considerable, because they enable the Court to enter into the national debate about the status of homosexuality in a manner that stresses the positive value of nondiscrimination while preserving the Court’s options in deciding how far it is willing to go in striking down legislation adversely affecting homosexuals. This flexibility allows the Court to calibrate its future decisions to the strength and quality of the public response to its opinion in Lawrence. Lawrence will undoubtedly provoke controversy, both within culture about the status of homosexuality and within constitutional culture about the validity of regulations based on sexual orientation. The Court will have to orient its future decisions to this debate, just as in Grutter it had to orient itself to public disagreements about affirmative action. Just as the Court in Grutter fashioned an innovative and flexible doc-

contraceptive devices as violating “what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of ‘liberty,’ the privacy of the home in its basic sense, and it is this which requires that the statute be subjected to ‘strict scrutiny.’” Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (citation omitted). The Court in Griswold later took this point to postulate a “zone of privacy created by several fundamental constitutional guarantees” that protects “the sacred precincts of marital bedrooms.” Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The notion of the private realm, however, has always fit awkwardly with the abortion decisions, which concern an act that can be viewed as either public or private.

Lawrence is explicit that in its view the “present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Lawrence, 123 S. Ct. at 2484.

Id.

Id. at 2480.

Opposition to the extension of the logic of Lawrence to marriage is predictable. See Defense of Marriage Act, 1 U.S.C. § 7 (2000) (defining “marriage” as “only a legal union between one man and one woman as husband and wife,” and “spouse” as “a person of the opposite sex who is a husband or a wife”). About a month before Lawrence, a constitutional amendment was proposed in the House of Representatives providing that “[m]arriage in the United States shall consist only of the union of a man and a woman.” H.R.J. Res. 56, 108th Cong. (2003). A little more than a month after the decision, in response to “social conservatives” who were “seething” over Lawrence, President Bush stated that he was proposing official action, which might include a constitutional amendment, that would define marriage as a union between a man and a woman. Neil A. Lewis, Bush Backs Bid To Block Gays From Marrying, N.Y. TIMES, July 31, 2003, at A1.
trinal response to public controversy, so the Court will want to reserve for itself the option of engaging public controversy in equally creative and supple ways in decisions subsequent to Lawrence.

The difficulty, however, is that the logic of Lawrence undercuts the public-private distinction that Lawrence uses to underwrite the space for this flexibility. Although Lawrence turns on the claim that "[t]he petitioners are entitled to respect for their private lives," it cannot plausibly mean that all conduct committed in "private" is entitled to immunity from stigmatizing criminal penalties. Lawrence must therefore distinguish forms of private conduct that can be publicly stigmatized from those that cannot. The Court comes closest to explaining such a distinction when it slaps Bowers for framing the "issue presented" as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Lawrence argues that this statement of the question participates in the very stigmatization that due process exists to prevent: "To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."

The constitutional liberty interests recognized in Lawrence do not concern particular sexual acts, but instead the ability to form "a personal relationship" without the government defining "the meaning of the relationship" or setting "its boundaries absent injury to a person or abuse of an institution the law protects." Lawrence explains:

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Lawrence interprets the Due Process Clause as attributing constitutional value to "enduring" personal relationships that are free from the control or stigmatization of the state. The state cannot prohibit sodomy, because sodomy is understood to be essential to a personal relationship that has constitutional value. This suggests that the state could, by contrast, penalize the private sexual practice of bestiality, be-

476 Lawrence, 123 S. Ct. at 2484.
477 Id. at 2478 (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).
478 Id.
479 Id.
480 Id.
481 Id. By framing the question in this way, Lawrence stresses the similarity between heterosexual and homosexual relationships.
cause bestiality is not an integral dimension of a constitutionally valuable relationship.

If enduring personal relationships have constitutional value, however, it is not clear why the Due Process Clause protects them only when the state seeks to regulate "the most private human conduct, sexual behavior, and in the most private of places, the home." \(^\text{482}\) Relationships are both public and private. They do not consist solely in how persons relate to each other in the home or in the course of sexual intimacies. Enduring personal relationships are also made up of how persons relate to each other in the performance of public roles and obligations. If \textit{Bowers} was incorrect in asking whether constitutional value should be attributed to the private, sexual aspects of a relationship, and if \textit{Bowers} should instead have accorded constitutional protection to the relationship itself, then it is the entire relationship, in both its public and private dimensions, that constitutes a protected liberty interest. Although past substantive due process opinions might have taken the position that private sexuality deserves greater protection because it is most intimately tied to the constitutional value of self-definition, \(^\text{483}\) this tack does not seem available to \textit{Lawrence}, \(^\text{484}\) which stresses the importance of interpersonal connection rather than private sexual behavior. \(^\text{485}\)

Not only does \textit{Lawrence}'s reasoning undermine the special value of private liberty, but it also undercuts the notion that the state may have particularly compelling reasons to regulate the public aspects of homo-

\(^{482}\) \textit{Id.}\n
\(^{483}\) \textit{See supra note 420.}\n
\(^{484}\) I should note in this regard that \textit{Lawrence}'s opening paragraph seems specifically designed to subordiate the theme of privacy to the theme of liberty:

\begin{quote}
Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.
\end{quote}

\textit{Lawrence}, 123 S. Ct. at 2475. The liberty stressed by \textit{Lawrence}, which "extends beyond spatial bounds," thus does not seem limited to specifically private conduct. \textit{Id.}\n
\(^{485}\) Because \textit{Lawrence} places constitutional value in personal relationships, its logic cannot be limited by reference to the form of privacy stressed by Justice Harlan's seminal dissent in \textit{Poe}, which is the origin of the public-private distinction in modern substantive due process doctrine. \textit{See supra note 471.} Harlan used privacy as a heuristic device to stress the impropriety of the state bringing "the full power of the criminal law" to bear on the regulation of behavior in the home. \textit{Poe} v. \textit{Ullman}, 367 U.S. 497, 548 (Harlan, J., dissenting). Unlike the Court in \textit{Lawrence}, Justice Harlan was not particularly concerned with protecting from general legal regulation either intimate sexual acts or even the marriage relationship itself. \textit{See id.} at 545-48 ("The laws regarding marriage . . . as well as the laws forbidding adultery, fornication, and homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.").
sexual relationships. It surely demeans and stigmatizes homosexual
relationships when the state does not endow their public manifestation
with the same indicia of respect that it accords to heterosexual rela-
tionships. If Lawrence believes that the function of the Due Process
Clause is “to demand respect for conduct protected by the substantive
guarantee of liberty,” if the constitutional guarantee of liberty at-
taches to homosexual relationships, and if legislation denying homo-
sexual relationships official recognition relegates them to second-class
status, state discrimination against the public dimensions of homosex-
ual relationships would seem to violate the very essence of the consti-
tutional guarantee.

The logic of Lawrence thus has exceedingly far-ranging implica-
tions. It would seem to render constitutionally suspicious at least as
broad a range of legislation adversely affecting homosexuals as would
a decision grounded explicitly on the Equal Protection Clause.

These implications are effaced, however, because Lawrence
deliberately retains, and even emphasizes, the rhetoric of the public-
private distinction, with its attendant implication that liberty is to be
especially protected within the private realm. By retaining this
distinction, the Court reserves the option in future decisions to decline
to use substantive due process to invalidate official refusals to accord
public recognition to homosexual relationships.

The best interpretation of this internal tension is to view Lawrence
as the opening bid in a conversation that the Court expects to hold
with the American public. The Court has advanced a powerful and

486 Lawrence, 123 S. Ct. at 2482.

487 It is also noteworthy in this regard that the egalitarian logic employed by Lawrence, which
uses the Due Process Clause to create an “equality of treatment” that prevents “discrimination
both in the public and in the private spheres,” id., is generally suspicious of public-private distinc-
ions. See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 643 (2000) (holding unconstitutional the
application of a state antidiscrimination law to the realm of private expressive association); Will
Kymlicka, Civil Society and Government: A Liberal-Egalitarian Perspective, in CIVIL SOCIETY
AND GOVERNMENT 79, 88 (Nancy L. Rosenblum & Robert C. Post eds., 2002) (arguing that the
inculcation of egalitarian norms should not be restricted by traditional public-private distinc-
tions). When egalitarian logic does recognize a public-private distinction, moreover, it typically
accords higher priority to eliminating discrimination in public than to eliminating discrimination
in private. See, e.g., Marie A. Failinger, Remembering Mrs. Murphy: A Remedies Approach to the
Conflict Between Gay/Lesbian Renters and Religious Landlords, 29 CAP. U. L. REV. 383, 383–85
(2001) (describing the “Mrs. Murphy exemption” by which certain types of private housing units
are exempt from the public accommodation and fair housing provisions of the Civil Rights Act);
Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Four-
teenth Amendment, 91 HARV. L. REV. 1, 46 (1977) (explaining that while equal treatment is re-
quired in “public life,” it may not apply to the same extent in the private sphere). That is the
structure of Title VII and of most antidiscrimination laws.

488 Indeed, due process analysis may be more far-reaching than equal protection analysis, be-
cause the framework of due process does not have to work through the doctrinal thicket of facial
classifications, disparate impact, and discriminatory purpose, which the Court has established to
hedge the enforcement of the Equal Protection Clause.
passionate statement that is plainly designed to influence the ongoing national debate about the constitutional status of homosexuality. But the Court has not committed itself to the full consequences of its position. It has crafted its opinion so as to allow itself flexibly to respond to the unfolding nature of public discussion. If the public becomes inflamed by the implications of the Court’s intervention, refusing to ameliorate its deep-seated opposition to same-sex marriage and therefore adamantly resisting the logic of Lawrence’s reasoning, the Court retains the option of invoking the public-private distinction as a rationale for further inaction.

In Lawrence, therefore, as in Grutter, the Court has shaped the substance of constitutional law to meet the demands of a dialectical relationship to constitutional culture. But whereas Grutter is relatively clear about the constitutional values at stake in its intervention into the public debate over affirmative action, the same cannot be said about Lawrence, which creates genuine uncertainty whether the constitutional values at issue in the question of sexual orientation should involve liberty of private conduct or instead equality of public respect.

If Lawrence’s ambiguity accurately captures the essential ambivalence of American constitutional culture on the question of sexual orientation, the Court will likely not be pressed to extend or defend the logic of its decision. The internal tensions that fracture Lawrence will remain latent, hidden by the correspondence between the Court and the public. But these tensions will become overt if the Court is called upon seriously to justify its decision, as for example if the public were to mobilize against Lawrence as it did against Roe, or if the Court

489 For a sample of that debate, see Lawrence, 123 S. Ct. at 2497 (Scalia, J., dissenting).
490 See, e.g., Frank Bruni, Vatican Exhorts Legislators To Reject Same-Sex Unions, N.Y. TIMES, Aug. 1, 2003, at A1 (discussing religious opposition to same-sex unions); supra note 475.
491 On that ambivalence, see Karst, supra note 340, at 543-44.

When the Supreme Court struck down a Texas law against sodomy a month ago, religious conservatives viewed the decision as a terrible defeat. But now, they increasingly think it has handed them a winning political issue: opposition to gay marriage.

In an unexpected shift in the electoral landscape, polls show that public support of gay rights in general, and of “civil unions” for same-sex couples in particular, has fallen about 10 percentage points since the court’s June 26 ruling.
were to decide in future cases to build upon Lawrence to reshape the values of American constitutional culture.\footnote{Leaders of the Christian Right say this is because Americans have realized that the legalization of gay marriage, which once seemed remote, is suddenly a real possibility.\textit{Id.; see also} Elisabeth Bumiller, \textit{Why America Has Gay Marriage Jitters}, \textit{N.Y. TIMES}, Aug. 10, 2003, § 4 (Week in Review), at 1; Richard Morin & Alan Cooperman, \textit{Majority Against Blessing Gay Unions}, \textit{WASH. POST}, August 14, 2003, at A1.}

In such circumstances the challenge facing the Court will be to defend the specifically legal authority of Lawrence. Because Scalia is no doubt correct to read Lawrence as informed by the changing views of sexual orientation within elite culture,\footnote{For a fascinating study of the relationship between the regulation of sexual orientation and constitutional culture in the context of state constitutions, see Douglas S. Reed, \textit{Popular Constitutionalism: Toward a Theory of State Constitutional Meanings}, 30 \textit{RUTGERS L.J.} 871 (1999). Reed traces how two forms of political activity, public interest litigation and ballot initiatives, have "profoundly structured the law on gay rights and same-sex marriage" in Oregon and Hawai'i. \textit{Id.} at 875.} the Court will be vulnerable to the charge that it is improperly appropriating the authority of law to enforce a partisan cultural perspective.\footnote{Lawrence, 123 S. Ct. at 2496 (Scalia, J., dissenting). Kenneth Karst has observed: When the Supreme Court held the Colorado amendment invalid in \textit{Romer v. Evans}, the influence on constitutional law of other cultural forms seemed evident. In a dissent that rivals his previous personal high for anger, Justice Scalia recognized — accurately, I believe — that the majority Justices had bought into the cultural shift that had been going on since the 1970s. He accused the majority of siding with the elites (such as lawyers and academics), who supported gay and lesbian Americans' claim to equal citizenship, rather than with the common folk (he called them "villeins") who wanted to preserve a social morality that denied "full social acceptance" of homosexuality. The part about siding with the elites rings true — and a similar characterization would have been appropriate for \textit{Brown v. Board of Education}, or \textit{New York Times Co. v. Sullivan}, or — how the canker gnaws! — \textit{Planned Parenthood v. Casey}. Karst, supra note 340, at 548 (footnote omitted). Justice Thomas, one might add, was equally correct to read Grutter's vision of the law of affirmative action as deeply informed by the views of the "cognoscenti." See supra p. 66.} The Court will not be able to defend against this charge by pointing to the text of the Constitution, or to the intent of the Framers, or even to the immanent values of American history and tradition. It will instead have to defend itself by articulating with clarity and integrity the constitutional values that inform its judgment. This will commit the Court to a substantive account of the specific constitutional provisions on which it chooses to rely, which will function to dispel the ambiguity that now envelopes Lawrence. The Court will have to develop either the logic of private liberty or the logic of public respect. And it will have to vouchsafe for the legality of whichever logic it chooses by embedding it within the practices that make up the institution of law, which is to say by en-
dowing it with the attributes of administrability, consistency, stability, predictability, and so forth.

IV.

The pressure the Court will experience to justify Lawrence, should it ever be required to explain or to build upon the decision, reveals a fundamental truth about the structure that binds together constitutional law and culture. The Court is authorized to regulate culture only insofar as it speaks with the authority of law. But the Court’s legal authority is subject to challenge whenever it must craft its legal judgments out of the same beliefs and values that are available to all literate members of the culture. Although the Court can stand on its official prerogative as the duly constituted head of the third branch of government, this prerogative will carry the Court only so far if the public comes to believe that the Court is using its decisions as a screen to advance a nonlegal, cultural agenda. That is why, should controversy engulf the Court, the legitimacy of a controversial and ambiguous decision like Lawrence will ultimately have to be understood diachronically, as a temporal process in which legal authority will develop in time.

The legal authority of Lawrence will evolve along two distinct tracks. The first is substantive. Because the legitimacy of constitutional law is rooted in constitutional culture, the Court can transform the content of constitutional law in controversial ways only by simultaneously transforming constitutional culture. The nation must come to believe that the Court’s distinct vision of constitutional law also expresses the country’s fundamental convictions and beliefs. The Court is vulnerable in this process, for the nation may follow the Court’s lead, as in Brown, or it may turn against the Court, as at the time of Dred Scott or the New Deal.496 The impassioned rhetoric of Lawrence suggests that the Court well understands that the opinion’s legal authority is connected to the Court’s success in influencing public opinion. Despite his embrace of the autonomy of constitutional law, Scalia also plainly understands this dynamic, for he uses his dissent to denigrate Lawrence as the mere “product of a law-profession culture[] that has largely signed on to the so-called homosexual agenda,”497 and to mobilize political resistance to Lawrence on the ground that the decision “dismantles the structure of constitutional law that has permitted

496 Alexander Bickel puts the matter well when he observes that “[t]he Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and — the short of it is — it labors under the obligation to succeed.” BICKEL, supra note 68, at 239.

497 Lawrence, 123 S. Ct. at 2496 (Scalia, J., dissenting).
a distinction to be made between heterosexual and homosexual unions.

The second track is institutional. The legal authority of *Lawrence* will evolve as the Court integrates the opinion into the practices that define the ongoing conventions of constitutional adjudication. We may call these practices the “rule-of-law virtues.” *Lawrence* will increasingly acquire an aura of legality as it is imbricated within a chain of judicial decisions that treat *Lawrence* as a legitimate judgment. It will grow in legal authority as future decisions manifest respect for *Lawrence*’s principles, as the Court appeals to the logic of those principles to control the outcome of cases, and as *Lawrence*’s logic is used to orient the ongoing development of the law. *Lawrence* will progressively shed its ambiguity as the incorporation of its principles into the ordinary practice of constitutional adjudication endows these principles with precision and force.

The substantive and institutional tracks are interconnected. The Court will clarify the legal principles of *Lawrence* in the context of changes in constitutional culture produced by the popular debate provoked by *Lawrence*. There will no doubt be an extended period of controversy and confusion as various factions struggle to shape the substance of constitutional culture, and as the Court remains correspondingly uncertain about exactly how to unfold the doctrinal implications of *Lawrence*. No doubt there will also eventually emerge some period of relatively secure equilibrium, in which the beliefs and values of the nation regarding the regulation of sexual orientation will roughly correspond to the constitutional standards regarding such regulation enforced by the Court. When we conceive the content of constitutional law as fixed and stable, as a set of clear and reliable black-letter rules, we typically have in mind the law that obtains in such periods of equilibrium.

There is a tendency to hypostatize such law as representing the “real” constitutional law, the kind that can be confidently summarized in textbooks. There is also a tendency to imagine that *Lawrence*’s le-

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498 *Id.* at 2498.

499 It was the Court’s strong signal that it would refuse to engage in such a diachronic process that ultimately rendered *Bush v. Gore*, 531 U.S. 98 (2000), such a distressingly arbitrary opinion. See Robert Post, *Sustaining the Premise of Legality: Learning to Live with Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 96, 98–99, 108–09 (Bruce Ackerman ed., 2002).

500 So, for example, the elevated scrutiny that constitutional law applies to classifications based upon sex is today taken as a stable and fixed black-letter rule of constitutional law. This is most probably because the rule roughly corresponds to the current beliefs of constitutional culture. We entirely forget, however, the period of turmoil and controversy that led to the creation of this black-letter law, in which the content of constitutional culture was transformed in ways that altered national perceptions of sex discrimination. See Post & Siegel, *Legislative Constitutionalism*, *supra* note 43, at 1980–2005.
gal authority must derive entirely from its fidelity to this kind of "real" law. From this perspective, the Court endangers its legitimacy whenever, as in \textit{Lawrence}, it departs from black-letter law. The difficulty with this way of understanding legal authority, however, is that it takes "real" law as given, and it consequently lacks any explanation of how such law comes to be or how it changes. It offers no account of the periods of flux and uncertainty that commonly produce black-letter law, and into which such law can dissolve as it drifts out of touch with constitutional culture. Conceptualizing judicial authority in terms of fidelity to an antecedent and fixed law thus cannot explain the legal authority necessary both to make and to alter black-letter law.

An account of constitutional law that must suppress the historical processes by which constitutional law comes into being cannot be adequate. An account of legal authority that focuses entirely on fidelity to a set of determinate and uncontroversial legal rules, immune from the tumultuous push and pull of history, cannot be acceptable. We instead need a theory of legal authority capable of guiding the Court as it passes through processes of historical contestation. The point is fundamental, because disagreement and debate, even if unobtrusive and inconsequential, pervade constitutional law. Just as culture is intrinsically controversial, so the periods of equilibrium that sustain our perception of black-letter law are at most matters of degree. The confusion and uncertainty that \textit{Lawrence} will undoubtedly inspire is unusual chiefly in its salience and intensity. This implies that legal authority cannot depend merely on the logical manipulation of received rules, but must instead be conceived as a living connection between the Court and the nation, the result of a certain relationship of trust that the Court works to establish with the American public.

If we inquire into the conditions of that trust, we shall find that at a minimum it requires public confidence that the Court will justly balance its obligation to maintain fidelity to rule-of-law virtues against its obligation to align its judgments with constitutional culture. How the Court navigates between these competing demands is not a theoretical question. We know that the Court can neither create constitutional law that is indistinguishable from culture, nor create constitutional law that seeks unilaterally to subordinate constitutional culture to the independent dictates of legal practice. But apart from these extreme positions, the Court must be guided by its practical tact and judgment, which Brandeis called statesmanship. Debate about how much weight should be assigned to rule-of-law virtues, as opposed to constitutional culture, is a persistent feature of constitutional adjudication.

\footnote{501 See supra note 245.} \footnote{502 See supra note 181.}
Such debate reflects not only differences of general jurisprudential orientation, but also substantive disagreements about the stakes that a specific case might raise when viewed either from the perspective of professional practice or from that of constitutional culture. Because the Court in Brown was deeply committed as a matter of professional belief to the constitutional value of nondiscrimination, it was willing to undertake extraordinary efforts to transform constitutional culture. But because some Justices evidently do not place a high legal value on the constitutional objective of protecting liberty, they view potential public criticism of the Court as a reason to abandon substantive due process doctrine. Because highly consequential public opposition would surely result were the Court to hold that Congress could not use Title VII to prohibit state sex discrimination, the Court in Hibbs was willing to modify its professional allegiance to the principle of the autonomy of constitutional law. But the Court was willing to maintain its commitment to that principle in the face of what it evidently (and correctly) anticipated would be relatively minor public opposition to a decision in Garrett holding that Congress could not use the ADA to prohibit state disability discrimination.

To those who think exclusively in terms of the autonomy of constitutional law, the pragmatic accommodation of Hibbs is a positive betrayal of judicial obligation. As can be seen from his dissents in Hibbs, Grutter, and Lawrence, Scalia takes indifference to popular reaction almost as a point of affirmative pride, an attitude that flows directly from his avowedly unconditional embrace of the autonomy of constitutional law. Scalia’s attitude cannot be easily dismissed, because it reflects the logical extension of viewing law as categorically distinct from culture, or, as it is more frequently said, of viewing law as completely divorced from politics.

There is unquestionably a history of heroism associated with this vision of law, a history of standing up for fundamental legal principles against a lynch mob of public opposition. Even if the jurisprudential claim of autonomy is theoretically unsustainable, therefore, Scalia’s position remains nettlesome precisely because this conception of the law-politics distinction is deeply ingrained and pervasively regarded as a necessary foundation for the maintenance of judicial independence. It is no accident that the Court characteristically appeals to this image of the law-politics distinction whenever it feels called upon explicitly to defend its legal authority.

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503 See supra notes 440, 495.
504 Such appeals are of course characteristic of the Court’s Section 5 decisions, but they are also evident elsewhere. See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1950) (emphasizing the judiciary’s authority to say “what the law is”).
Close attention to decisions like *Hibbs*, *Grutter*, and *Lawrence* suggests that this defense is primarily ideological, and that constitutional adjudication does not actually proceed on the assumption that law and politics are mutually exclusive. When it comes to deciding cases, courts conceive politics as the medium within which, and out of which, they construct law. The difficulty, however, is that this cannot be frankly acknowledged without simultaneously undermining the Court's authority to speak as the "instrument[\]^505\) of a law that is known and fixed, in which "principle and logic" entirely determine "the decisions of this Court."^506 What is ultimately at stake in appeals to the autonomy of constitutional law, therefore, is the form of judicial authority thought necessary to sustain the institution of judicial review. This suggests that although generations of legal scholars have demonstrated the empirical and theoretical deficiencies of modeling constitutional law as categorically distinct from politics, courts cannot escape the grip of imagining constitutional law as autonomous until they are able to embrace an alternative account of judicial authority.

It would be most useful to develop such an alternative account from the relatively uncontroversial insight that respect for the integrity and independence of the judiciary depends upon public confidence that courts are competently performing their task of articulating constitutional law. If, as I have argued in this Foreword, constitutional law emerges from a continual renegotiation of the competing demands of the rule-of-law virtues and the constitutional convictions of the nation, courts must conceptualize effective constitutional law not as the ground of this confidence, but rather as its consequence. In *Hibbs*, *Grutter*, and *Lawrence*, the Court folds its recognition of constitutional culture into the substance of constitutional doctrine, and by this process of craft summons constitutional law into existence. The authority of that law does not, and cannot, depend upon the exercise of purely professional logic, but rather upon public support for the Court that fashions it.

So long as the Court continues to believe that judicial review can be justified only by a form of authority that determines in advance the outcome of judicial decisionmaking, it shall remain haunted by the chimerical ideal of an autonomous constitutional law. To move beyond the paralyzing influence of that ideal, the Court must begin to reconceive judicial authority as the consequence of a relationship of trust that it continuously strives to establish with the nation. It must come to believe that the institution of judicial review will remain le-

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505 Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) ("Courts are the mere instruments of the law . . . ").
gitimate to the extent that the Court retains the warranted confidence of the country, conferred in recognition of a judiciary that is deeply loyal to "the compelling traditions of the legal profession"\textsuperscript{507} apprehended with due regard for the constitutional convictions of the American people.

\textsuperscript{507} Rochin v. California, 342 U.S. 165, 171 (1952).